Supreme Court, U.S.
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No. —— OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERCA, AFL-CIO, CLC,
Petitioner,

v.

PERFORMANCE FRICTION CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether it is beyond the remedial authority of the National Labor Relations Board to order reinstatement and back pay for employees who have not participated in a union organizing drive but are nonetheless subjected to and terminated under a disciplinary system, purposefully designed to discourage union activity, when they would not have been terminated but for the illegally adopted disciplinary system?

II. Whether an appellate court, relying solely on the factual representations of counsel made on appeal, has jurisdiction to modify the remedy of the National Labor Relations Board, without affording the Board an opportunity to engage in fact-finding at a compliance proceeding to assess whether evolving circumstances warrant a revision of the NLRB's *status quo ante* order?

PARTIES TO THE PROCEEDING

- Performance Friction Corporation, petitioner and cross-respondent below.
- United Automobile, Aerospace & Agricultural Implement Workers, AFL-CIO, CLC, intervenor below, and, as such, has standing to seek review before this Court, *International Union of Mine, Mill and Smelter Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338-39 (1945).
- National Labor Relations Board, respondent and cross-petitioner below.

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OPINIONS AND ORDERS BELOW

The decision and order of the National Labor Relations Board was issued on November 30, 1995, and is reported at 319 NLRB 859. App. 16a. The Board's order is a final order under Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e).

The decision of the Fourth Circuit Court of Appeals was issued on June 30, 1997, and is reported at 117 F.3d 763 (4th Cir. 1997). App. 1a. The judgment of the Fourth Circuit Court of Appeals was issued on August 8, 1997, and is found at App. 72a.

The decision denying rehearing and rehearing *en banc* was issued November 17, 1997, and is found at App. 70a.

JURISDICTION

The order in this case was entered on June 30, 1997, and judgment for which review is sought was entered on August 8, 1997.

The order denying rehearing and the suggestion of rehearing en banc was entered on November 17, 1997.

28 U.S.C. § 1254(1) confers jurisdiction upon this Court to review the judgment below.

RELEVANT STATUTES AND REGULATIONS

29 U.S.C. § 157 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .

29 U.S.C. §§ 158(a)(1) and (3) state in relevant part:

> (a) Unfair labor practices for an employer
>
> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

29 U.S.C. §§ 160(c), (d), (e), and (f) state in relevant part:

> (c) . . . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has

engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . .

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals . . . for enforcement of such order . . . . Upon the filing of such petition, the court . . . shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board . . ., the court may order such additional evidence to be taken before the Board . . . and to be made a part of the record. The Board may modify its findings

> as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. . . .
>
> (f) Review of final order of Board on petition to court
>
> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals . . . by filing in such court a written petition praying that the order be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of the section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF THE CASE

Jurisdiction in the Fourth Circuit Court of Appeals was based upon 29 U.S.C. § 160(e) (petition to court for enforcement of order) and (f) (review of final order of Board on petition to court).

Factual Background

In early February 1994, the employees at Performance Friction Corporation ("PFC")[1] sought the aid of the

[1] PFC manufactures non-asbestos brake pads at a plant in South Carolina.

United Automobile, Aerospace and Agricultural Implement Workers (the "UAW" or "Union") to organize their 400 co-workers into a union. App. 2a-3a. As found by the Board, and as affirmed by the Fourth Circuit Court of Appeals, App. 3a, 7a-10a, PFC responded to the Union's campaign by committing numerous and wide-ranging violations of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), and by discharging six employees in retaliation for their union activities in violation of Section 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3).

As also found by the Board, App. 40a, 59a-60a, and affirmed by the Fourth Circuit, App. 7a-8a, PFC "unlawfully implemented [a] new disciplinary system on April 19, 1994—shortly after the Union began organizing the company's workforce—in order to discriminate against the Union and union adherents . . . and . . . the company then proceeded to use that system to unlawfully discharge known union supporters Hinson, Kennedy, Rower, Steele, and Hudson." App. 7a-8a (citations omitted). Under the old disciplinary system, supervisors were allowed to use their discretion in classifying infractions as "minor" or "major." The new and stricter system eliminated that discretion. The new system also made discharge much easier and faster. Under the old system, three major violations—within a 30-day period—could trigger an employee's discharge. Under the new system, only two major violations—within 90-day period—were sufficient to trigger either discharge, if the employee was paid at the bottom pay level, or demotion of one pay level. App. 33a-34a.

These tactics successfully extinguished the organizing effort. Perhaps as a reminder, however, PFC left the new disciplinary system in place even after the organizing activity died out.

To remedy the unlawfully motivated changes to PFC's disciplinary system, the Board ordered that PFC rescind

the new and stricter disciplinary system, as well as any discipline taken pursuant to the new disciplinary system, and that PFC make employees whole for losses suffered under the new system. App. 19a-21a. The Board's decision, however, specifically provided that PFC could retain any disciplinary action it had taken since the advent of the new disciplinary system if PFC could show, in subsequent compliance proceedings, that it would have taken the same action under the terms of the old disciplinary system. App. 17a, n.2. Despite this qualification the Fourth Circuit not only rejected the Board's *status quo ante* remedy, but it also crafted its own remedy—one which denies any relief for the illegally adopted disciplinary policy or for any actions taken pursuant to it. App. 15a.

Proceedings Below

1. Decision of the Administrative Law Judge of the National Labor Relations Board. After a full hearing on the merits, the Administrative Law Judge ("ALJ") determined that PFC had violated the NLRA in that it illegally:

> threatened employees that it would be futile for them to select the Union as their collective bargaining representative; impliedly threatened to reduce wages if employees selected the Union to represent them; interrogated employees about their union sympathies and activities, and the activities and sympathies of fellow employees; solicited grievances from employees and expressly or impliedly promised to remedy those grievances in order to discourage union activities among employees.

App. 63a-64a. Further, the ALJ found that PFC:

> Instituted a new and stricter disciplinary system in response to employee union activity both to discourage such activity and to rid itself of union activists, and [PFC] thereby violated Section 8(a)(1) and (3) of the Act.

App. 64a. Finally, the ALJ found that:

> Pursuant to its new and stricter disciplinary system, [PFC] discharged union activists Martha Hinson, Merri Rose, Haywood Steele, Manuel Montecon [sic], Jerry Kennedy, and other employees, and [PFC] thereby violated Sections 8(a)(1) and (3) of the Act.

Id.

2. Disposition of the National Labor Relations Board. Performance Friction filed 56 exceptions to the decision of the ALJ to the National Labor Relations Board on May 29, 1995. App. 16a; J.A. 890. With one modification, not now pertinent, the NLRB upheld that 8(a)(1) and (3) violations by PFC, and ordered the remedy found at App. 19a-21a—including the recission of the illegally motivated and adopted disciplinary system, as well as the recission of all discipline meted out under that system.

As part of its remedy, the Board ordered that PFC:

> (a) Rescind the new and stricter disciplinary system which was instituted by [Performance Friction] in response to employee union activity.
>
> (b) Rescind any disciplinary action taken pursuant to the stricter disciplinary system which system [PFC] instituted in response to employee union activity.
>
> (c) Offer Manuel Mantecon, who was unlawfully discharged for engaging in union activities, and Martha Hinson, Merrie Rowe, Haywood Steele, Susan Hudson, Jerry Kennedy, Kyle Myers, Bernard Young, Leslie Teague, and any other employee unlawfully discharged pursuant to the new disciplinary system, immediate and full reinstatement to their former jobs . . . and to make them whole . . . as a result of the discrimination against them.

App. 19a-20a. The additional named employees were those for whom no evidence of known union activism was presented. They were terminated pursuant to the new and stricter disciplinary system which the Board found had been adopted in order to rid PFC of union activity.

3. Disposition of the Panel of the Fourth Circuit Court of Appeals. On June 30, 1997, the three judge panel of the Fourth Circuit upheld all the factual determinations that PFC had committed unfair labor practices in adopting a new, stricter disciplinary policy in response to union activities, in using that policy to rid itself of union activists, and in terminating another employee for his union activities, in using that policy to rid itself of union activists, and in terminating another employee for his union activities. App. 10a. However, the panel decided that the Board's remedial order was unjustified, and without the benefit of additional fact-finding to determine whether revision of the Board's order was warranted, refused to require PFC to rescind the illegally adopted discipline policy and refused to require PFC to rescind any discipline meted out under that policy. App. 15a. In the subsequent judgment issued on August 8, 1997, the panel accepted PFC's counsel's unsubstantiated representations that, long after the unfair labor practice hearing, PFC had made unconditional reinstatement offers to all discriminatees, and that all had refused those offers. App. 74a. Based on those representations, the panel ordered back-pay cut off as of the date of the alleged refusal of the alleged reinstatement offers, App. 74a, despite the fact that there has been no finding PFC ever made proper, bona fide offers of reinstatement, nor that these discriminatees have declined proper, bona fide offers of reinstatement. The appeals court had no jurisdiction to engage in fact-finding, nor to foreclose full make-whole remedies to these illegally fired discriminatees. As always, the ALJ and the Board provided opportunity for PF to show that it could retain any disciplinary action it had taken if PFC could show, in a compliance hearing, that it would have taken the same action against the employee under the terms of its prior disciplinary system, *e.g.*, App. 17a, n.2. Further, the ALJ and the Board did not broadly enjoin any *future* management decisions of PFC, unless such decisions were made with anti-union animus. App. 66a-67a, 19a-21a. Despite a remedy carefully tailored to conform to the scope of

PFC's violations and the precedents of this Court and other circuits, the appeals court rejected and eviscerated the Board's traditional *status quo ante* remedy, permitting PFC to keep its unlawfully implemented policy as a daily reminder to all PFC employees of the consequences of attempting to exercise their rights under the NLRA.

4. Disposition on Request for Rehearing and Rehearing En Banc. The Fourth Circuit, on November 15, 1997, denied the NLRB's and the UAW's timely requests for rehearing and suggestions for rehearing en banc. App. 71a. Both the NLRB and the UAW sought modification of the order and judgment only insofar as the June 30 order and August 8 judgment foreclosed any remedy whatsoever for PFC's adoption of the new, stricter disciplinary policy, and with respect to the judgment which, without any opportunity for any fact-finding—determined that none of the illegally terminated employees was entitled to any back pay after PFC allegedly offered them reinstatement.

SUMMARY OF THE ARGUMENT

The Fourth Circuit's decision conflicts with decisions of other circuits directly on point, and with Supreme Court precedent which, by analogy, is on point. The appeals court has misunderstood and misapplied the circuit court rulings on which it relies in rewriting the Board's remedial order. Additionally, the Fourth Circuit's decision usurps the Board's remedial authority and, without jurisdiction, engages in impermissible fact-finding in order to promulgate its own order, functions which by statute and precedent reside exclusively in the Board. Finally, recent Fourth Circuit case law demonstrates that the erroneous decision in this case is already being followed in the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit has seriously undermined the NLRB's power to effectuate the purposes of the NLRA. The difference in the Board's remedial remedy and that promulgated by the Fourth Circuit is profound. The Board's

remedy requires the restoration of the *status quo ante* by recission of the illegal disciplinary system. App. 19a. The Fourth Circuit allows PFC to keep its illegally adopted disciplinary system, App. 15a, thereby condoning the very illegal activity which forms the basis of this action. The Board's remedy requires that each employee, regardless of that employee's known union sentiments, injured by the illegal system be made whole—by recission of the discipline meted out under the illegal system. The Fourth Circuit, however, requires that each employee injured by the illegal system prove also that s/he was a known union supporter in order to be made whole. App. 15a. In short, the Fourth Circuit's remedy not only allows PFC to keep its illegal system that spelled the demise of the union, but it also blocks any remedy for any employee injured by the illegal disciplinary policy unless that employee prove that PFC disciplined him or her *because of that employee's union activities.* App. 74a, 15a.

The Fourth Circuit's decision here is not just some strange aberration contrary to this Court's and other circuit courts' precedents. Rather, as the recent Fourth Circuit decision in *Eldeco, Inc. v. NLRB,* 1997 WL 790517 (4th Cir. 1997) shows, it is already setting a new precedent in eviscerating the Board's remedial authority.

This is a case in which the employer has admitted, and additionally has been found by an Administrative Law Judge ("ALJ"), the NLRB, and the Court of Appeals—to have purposefully, and in a variety of ways, violated the rights of its employees to determine, free of coercion, whether to join a labor union. In order to make those findings, these three judicial bodies have found, in adversarial proceedings in which PFC participated fully, that PFC repeatedly, purposefully, and egregiously violated the Act, repeatedly violated individual employee's rights, and furthermore, in order to threaten and discourage each and every employee from ever attempting to exercise those statutory rights in the future, changed its disciplinary

policy to make it easier to get rid of employees who show any signs of Union activism. Thus, today, PFC is a company without a Union. PFC terminated each and every union leader, and—pursuant to the new disciplinary policy which was adopted "*in order to discriminate against the Union and union adherents*", App. 8a—some 300 additional employees, as of at the time of oral argument before the Fourth Circuit. App. 4a; J.A. at 1102-05. Three judicial bodies found that PFC "*used this new system to discourage union activity and thin its ranks of union activists. . . .*" App. 9a. Owner and president of PFC, Don Burgoon, and assistant production manager Mike Ford, "opposed the Union through what it now concedes were unlawful labor practices . . . ." App. 3a. The Fourth Circuit found:

Performance Friction, for example, does not challenge that it illegally:

> threatened employees that it would be futile for them to select the Union as their collective bargaining representative; impliedly threatened to reduce wages if employees selected the Union to represent them; interrogated employees about their union sympathies and activities, and the activities and sympathies of fellow employees; solicited grievances from employees and expressly or impliedly promised to remedy those grievances in order to discourage union activities among employees. J.A. at 884, 915.[2]

App. 3a, n.1. Burgoon and Ford were so determined to drive the Union out of PFC that they threatened and purposefully "nearly ran over two Union activists with their truck, J.A. at 93." App. 9a.

PFC denied at trial and on appeal both to the Board and the Fourth Circuit that it adopted the new and stricter disciplinary policy in order to rid itself of union activists, and instead tried to show that it had adopted the policy

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[2] Internal citation to the Joint Appendix to the Fourth Circuit.

in November 1993, months before the Union ever appeared at PFC. App. 8a. However, in a sworn affidavit prepared by PFC's attorney, production manager Ford testified 7 times that the new discipline system was adopted in April 1994. J.A. 973-77; App. 8a. Ford recanted his testimony at the hearing, but substantial evidence, including every piece of documentary evidence showed he was lying:

> "[n]o fewer than 11 instances of discipline were issued . . . not only on forms used under the old system, but clearly utilizing the rules of the old system," J.A. at 868. . . . Furthermore, prior to April 1994, the handbooks that Performance Friction distributed to new employees still included the rules for the old disciplinary system. J.A. at 161.

App. 8a.

Despite these findings, the appeals court decided that requiring PFC to rescind this illegally adopted policy, which has been so effective in keeping PFC union free, is a remedy exceeding the scope of PFC's violations. App. 11a, 74a. Further, the Fourth Circuit held that requiring PFC to make whole all employees discharged under this illegally adopted policy exceeds the Board's remedial authority. App. 11a, 74a. Specifically, the court's judgment states:

> Performance Friction Corporation shall *not be required to reinstate or provide back pay* to Kyle Myers, Bernard Young, Leslie Teague, Michael Thompson, and Nedra Stewart, *or any other employee* except those mentioned above, *until such time as it is proven that their discharges were the consequence of their pro-Union affiliation or sentiments.*

App. 74a; App. 11a (emphasis added). And finally, the appeals court, without benefit of any factual findings in an adversarial proceeding, factually found that illegally fired discriminatees Manual Mantecon, Martha Hinson, Merrie Rowe, Haywood Steele, Susan Hudson and Jerry Kennedy were entitled to back-pay only "up until they

declined to accept Performance Friction Corporation's offer of reinstatement." App. 74a. This rewriting of the Board's remedies for proven violations is contrary to Supreme Court precedent, as well as decisions of other circuit courts of appeal. Since the matter of whether PFC had actually made bona fide offers of reinstatement, and if so, whether each discriminatee had refused it, had never been factually determined by the ALJ or the NLRB, the court of appeals based its reversal of the NLRB's order on matters over which it had no jurisdiction.

The NLRA contains a "broad command", *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262 (1969), which authorizes the Board to order a party who has violated the Act to "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c). This Court has long held "that the remedial power of the Board is 'a broad discretionary one,' subject to limited judicial review." *J. H. Rutter-Rex*, at 263, *quoting Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). "In fashioning its remedies under the broad provisions of § 10(c) of the Act (29 U.S.C. § 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must . . . be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969).

The NLRA expresses Congress' "public policy . . . by making the employees whole for losses suffered on account of an unfair labor practice." *J. H. Rutter-Rex*, 396 U.S. at 263, *quoting Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). "The NLRB's remedial aim is "to 'restor[e] the economic status quo that would have obtained but for the company's wrongful [action].' " *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1344 (D.C. Cir. 1995) (quoting *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969)."

Nowhere, neither in the Act nor in any judicial decision, is expressed a limitation that the NLRB's remedial aim to make whole employees injured by an unfair labor practice is reserved only for pro-union employees. Indeed, such a limitation as required by the Fourth Circuit in this case, directly thwarts the purpose of the Act and the powers of the Board to effectuate those purposes, while, at the same time, penalizes employees who are innocently caught in the web of a determined employer's rage to rid itself of union activity.

I. THE DECISION CONFLICTS WITH OTHER CIRCUITS AND WITH CLOSELY ANALOGOUS SUPREME COURT PRECEDENT.

Congress has deferred to the National Labor Relations Board the task of fashioning remedies for violations of the NLRA, 29 U.S.C. § 160; *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969); *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 898-99 (1984) (Board has "the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review."). All courts have recognized that the Board's choice of remedy must be *enforced* unless the remedy is arbitrary, capricious, or patently exceeds the scope of the Act. *ABF Freight Sys., Inc. v. N.L.R.B.*, 510 U.S. 317, 322-24 (1994); *Sure-Tan, Inc.*, 467 U.S. at 898-99; *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941). Nevertheless, the Board's order must truly be remedial, not punitive, and must be designed to "restor[e] the economic status quo that would have obtained but for the company's [wrongdoing]." *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). Here, the appeals court's decision and judgment prevent the Board from restoring the *status quo ante*.

The Board has consistently ordered *status quo ante* and make-whole relief when employers have illegally changed policies or rules in order to discourage union activity. *See, e.g., Robinson Furniture, Inc.*, 286 NLRB 1076,

1076-77, 1078 (1987) (Board ordered expunction of all written warnings issued subsequent to unlawfully motivated change in disciplinary system, but like the instant case, also allowed employer to show in compliance proceeding that it would have imposed discipline under previous system); *Joe's Plastics, Inc.*, 287 NLRB 210, 211 (1987) (initiation of a disciplinary warning system was unlawfully motivated; "any warning issued pursuant to it is therefore invalid"); *International Business Systems, Inc.*, 247 NLRB 678, 681-82 (1980) (employer required to expunge from its records any warnings given to employees pursuant to the change in the disciplinary system that was unlawfully motivated), *enforced mem.*, 659 F.2d 1068 (3d Cir. 1981).

Circuit courts likewise have routinely enforced Board remedies requiring *status quo ante* and make-whole relief in cases of this nature. *See e,g. Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65, 74 (4th Cir. 1996) (requiring company to "rescind unlawful company rules"); *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 509 (4th Cir. 1991); *Hyatt Corp. v. NLRB*, 939 F.2d 361, 375 (6th Cir. 1991) ("where a system as a whole was implemented for a retaliatory purpose, the Board need not find illegal motivations as to specific individuals"), *enforcing Hyatt Regency Memphis*, 296 NLRB 259, 263, 266 (1989); *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1334 (7th Cir.), *cert. denied*, 439 U.S. 911 (1978). When an employer uses an illegally adopted policy, the Board and every court to rule on same, until now, has held that the policy—becaues it was adopted illegally, with the intent to punish employees for the exercise of their Section 7 rights—must be rescinded, and that each employee injured by the use of the illegal policy, must be made whole. As each of the cases cited herein makes clear, the illegal policy must be purged and the fruits of that illegal policy must likewise be purged—just as the fruits of a warrantless search may not be used.

The Fourth Circuit expressly relied upon both *Frigid Storage* and *Electri-Flex* in order to affirm the Board's finding that PFC acted unlawfully when it implemented a stricter disciplinary system in order to discriminate against the union and union adherents. App. 8a. In *NLRB v. Frigid Storage, Inc.*, 934 F.2d 506, 510 (4th Cir. 1991), the court enforced a Board order which, as here, expressly barred the wrongdoing employer from continuing to enforce an unlawfully implemented disciplinary system. Specifically, the Board's remedy provided: "To remedy the unlawful written warning system, the [employer] shall be ordered to *cease and desist from using this system.*" *Frigid Storage*, 294 NLRB 660, 662 (1989) (emphasis added). The Board also found "the written warnings issued pursuant to this system similarly violate the Act and must be removed from employees' records." *Id. at* 660. It specifically ordered that the employer "[r]emove from its files the written warnings found unlawful . . . ." *Id.* at 663. This was the order enforced by the Fourth Circuit.

Similarly, in *Electri-Flex Co. v. NLRB*, 570 F.2d 1327, 1334 (7th Cir.), *cert. denied*, 439 U.S. 911 (1978), upon finding that the employer's initiation of a disciplinary system of written warnings was unlawfully motivated, the Seventh Circuit enforced the Board's remedy that the employer "[r]emove from the personnel or other files of employees all disciplinary warning letters or memoranda" issued since the inception of the new discriminatory system. *Electri-Flex Co.*, 228 NLRB 847, 850 (1977). Before the Seventh Circuit, the employer had objected to this remedy, contending that "the Board failed to find on an 'incident-by-incident basis' that illegal motivation was behind the issuance of each notice." *Electric-Flex Co. v. NLRB*, 570 F.2d at 1334. The court firmly rejected this attack by noting that the employer's assertion that "some of the [discipline] may have been warranted, misses the point." *Id.* at 1335. The court continued: "It is motivation, not justification, which determines the existence

vel non of discriminary motive. While disciplinary action may have been warranted in some instances this does nothing to reduce the charge made by the union and the finding of the Board that the system as a whole was implemented for a retaliatory purpose . . . ." *Id.* Accordingly, the court enforced the Board's remedial relief.

While this Court has never ruled on the propriety of the remedy for an illegally motivated change in policy, it has ruled in a similar context in "refusal to bargain" cases. In *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), the question before the Court was: "Was the Board, in a case involving only a refusal to bargain, empowered to order the resumption of operations which had been discontinued for legitimate business reasons and reinstatement with back pay of the individuals formerly employed therein?" *Id.* at 208. The answer is "yes." *Id.* This Court held that the Board has full authority to fashion make-whole remedies "when loss of employment stems directly from an unfair labor practice." *Id.* at 217 n.11. As in *Fiberboard*, PFC here maintains that it has legitimate business reasons for keeping its illegally adopted disciplinary policy, and, as with *Fiberboard*, that it would be punitive and expensive to reinstate, with back pay, all workers fired as a result of the illegally adopted policy. However, as *Fiberboard* makes clear, the appeals court erred in finding that the Board exceeded its remedial authority in requiring the same remedy required in *Fiberboard*.

Similarly, in *Power Incorporated v. NLRB*, 40 F.3d 409 (D.C. Cir. 1994), like *Fiberboard*, a "refusal to bargain" case, the court required the company to resume the drilling operations it had subcontracted out in violation of the Act, and to reinstate and make whole all employees, regardless of their support for the union, previously employed in the drilling operations. The company argued that this remedy was " 'unduly burdensome' because it

would require the company, having sold its drills, to buy new drills." *Id.* at 425. The D.C. Circuit explained:

> An order to resume unlawfully subcontracted operations seeks to "restor[e] the *status quo ante* to ensure meaningful bargaining". *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216-17 (1964). Once unlawful subcontracting is found, such an order is presumptively a valid remedy, and should be overturned only upon a showing by the employer that "compliance with the order is unduly economically burdensome" because resumption "would require a substantial outlay of capital or otherwise cause undue hardship." *Teamsters Local No. 171 v. NLRB*, 863 F.2d 946, 957-58 (D.C. Cir. 1988), *cert. denied* 490 U.S. 1065 (1989).

Power Inc., 40 F.3d at 425. Since the company failed to show that leasing or purchasing new drilling equipment would result in financial hardship, the court upheld the Board's remedy as "necessary and appropriate . . . to restore the *status quo ante*." *Id.* Here, too, the Board's remedy is both necessary and appropriate to restore the *status quo ante*. Here, too, PFC has made no showing of undue burden in rescinding the illegal policy and making whole those who suffered from it.

If Performance Friction is allowed to maintain the policy adopted "in order to discriminate against the Union and union adherents," App. 8a, and "used . . . to discourage union activity and thin its ranks of union activists," App. 9a, PFC employees, both past (at new job settings) and current, will remain too terrified to exercise their Section 7 rights. The cost for supporting a union becomes simply too great, and the supposed protections provided by the Act are meaningless. The employees who were upfront about their union activities were the first discharged under the illegal policy. But others were discharged along with them.[3] And just to make sure the message stuck, and

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[3] They were terminated either because they were engaging in the same behavior as the union activists and, in order to cover their

to make it easier to get rid of any future union supporters, PFC left its policy in place.

That message cannot have been lost on PFC's employees —both those who were there in April 1994, and those who have been employed there since then. That message—don't stick your neck out, and don't let any of your co-workers stick their necks out—because *all* the employees will suffer with the imposition of stricter disciplinary rules and less protections from job loss.

As the dissent recently explained in *Eldeco, Inc. v. NLRB*, 1997 WL 790517 (4th Cir.), in protesting similar evisceration of a Board remedy by the Fourth Circuit:

> If the purpose of a work rule is to suppress the exercise of section 7 rights, the employer has committed an unfair labor practice, not-withstanding that the rule is applied to pro- and anti-union alike. *Standard-Coose-Thatcher Carpet Yarn Div'n v. NLRB*, 691 F.2d 1133, 1141-43 (4th Cir. 1982). Why? Because every worker has section 7 rights, whatever his attitude at any given time toward collective representation. Heavyhanded retaliatory tactics like Eldeco's drug testing are illegal not just because they may unfairly and coercively blunt a current organizational drive, but also because their example serves to squelch any incipient desires for representation in the existing workforce. Pillories and hangings were public for their salutary effects on witnesses, and many a saber has been rattled to keep the peace. A deliberate show of force is a deliberate exercise of force.

Eldeco, 1997 WL 790517, *9.

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tracks, the employer fired them too—or PFC may have thought they were friends with the union activists and it was good to get rid of them too just in case they supported their friends' union proclivities.

II. THE FOURTH CIRCUIT LACKED JURISDICTION EITHER TO FIND ITS OWN FACTS OR TO PROMULGATE ITS OWN REMEDIAL ORDER.

The appellate court's decision in this case not only usurps the Board's remedial authority, but further, and without jurisdiction, engages in impermissible fact-finding in order to promulgate its own order, functions which by statute and precedent reside exclusively in the Board.

A. The Appeals Court Exceeded Its Authority In Fashioning Its Own Remedy.

As noted above, "the remedial power of the Board is 'a broad discretionary one, subject to limited judicial review'." *J. H. Rutter-Rex.*, at 263, *quoting Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). "In fashioning its remedies under the broad provisions of § 10(c) of the Act (29 U.S.C. § 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must . . . be given special respect by reviewing courts." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969). Courts must defer to the Board's expertise in its choice of an affirmative remedy unless "the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [NLRA]." *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

Although 29 U.S.C. §§ 160(e) and (f) grant appellate courts the power "to make and enter a decree . . . modifying, and enforcing as so modified" orders of the Board, courts "should not substitute their judgment for that of the Board in determining how best to undo the effects of unfair labor practices." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 899 (1984). This Court has noted:

> Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding

> unconsciously from the narrow confines of law into the more spacious domain of policy.

Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). *See also NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953) (power to fashion remedies "is for the Board to wield, not for courts.").

In *Sure-Tan, Inc. v. NLRB*, this Court held that an appellate court exceeded its authority in crafting its own remedy, when remand to the Board was the proper course of action. In *Sure-Tan*, as in this case, the Seventh Circuit fully agreed with the Board that the employer had committed the unfair labor practices at issue. 467 U.S. at 889. However, in *Sure-Tan* as in this case, the appeals court disagreed with the Board's remedial order and itself rewrote the remedial order. *Id.* at 889-90. This Court held that the appeals court "exceeded its limited authority of judicial review by modifying the Board's order . . . [because the modifications] represent just the type of informed judgment which calls for the Board's superior expertise and long experience in handling specific details of remedial relief." *Id.* at 905, citing *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975) and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). When an appellate court believes that the Board has erred in some fashion in crafting its remedial order, "the appropriate course was to remand back to the Board for reconsideration." *Sure-Tan*, 467 U.S. at 905. As this Court held in *NLRB v. Food Store Employees*, 417 U.S. 1, 10 (1974):

> [W]hen a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course. Application of that general principle in this case best respects the congressional scheme investing the Board and not the courts with the broad powers to fashion

> remedies that will effectuate national labor policy. It affords the Board the opportunity, through additional evidence or findings, to reframe its order better to effectuate that policy.

Here, the Fourth Circuit has ignored the mandates of the Act and this Court, and has nullified a remedial order of the Board which simply restores the *status quo ante*. There is no explanation or reasoning by the Fourth Circuit, nor any claim by PFC, as to how the Board's order, which requires a determination in compliance which employees were terminated pursuant to the illegally motivated disciplinary policy who would not have been otherwise terminated, and to award those employees back pay and reinstatement—regardless of those employees' union activities, accomplishes purposes outside the Act. *See also Food Store Employees,* 417 U.S. at 8 (holding that appeals court, in ordering Board to award union attorney fees for "flagrant repetition" of conduct previously found unlawful, "improperly exercised its authority under § 10 (e) and (f) to modify Board orders, and the case must therefore be returned to the Board.")

Likewise, in *South Prairie Construction Co. v. Local No. 627,* 425 U.S. 800, 806 (1976), this Court again held that an appeals court must remand to the NLRB for matters peculiarly within its expertise. "In foreclosing the Board from the opportunity to determine the appropriate bargaining unit . . ., the Court of Appeals did not give 'due observance (to) the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution.'" *Id., quoting FCC v. Pottsville Broadcasting Co.,* 309 U.S. 134, 141 (1940).

B. The Appeals Court Lacked Jurisdiction to Engage In Fact-Finding To Support Its Own Remedy.

The Fourth Circuit has not only exceeded its authority by rewriting the remedial order, but it has gone beyond

that by engaging in its own fact-finding to justify the scope of its own remedy. Not only has the Fourth Circuit eviscerated the very remedy specified in the Act and routinely ordered by the Board and the courts, it has done so based upon PFC's arguments on appeal that the remedy would cause it to abandon a disciplinary policy it really likes and which, according to PFC, has produced excellent results, and that it had no idea that it would be required to rehire all those workers it fired pursuant to a policy that has now, long after the events upon which this case was tried in 1994, shown its effectiveness. App. 3a, citing PFC's reply brief on appeal.

The Fourth Circuit listened and heard these arguments on appeal. Labeling the Board's requirement to rescind the illegally motivated policy "the equivalent of a hostile government takeover of a company through administrative agency regulation," App. 11a, the appeals court incorrectly characterizes the Board's order a "permanent" rescision of PFC's "entire personnel disciplinary system." *Id.* As is clear from the Board's order, App. 19a-21a, it is neither permanent, nor is there any requirement to rescind anything but the illegal policy put in place in 1994. But, "A pretextual argument fares no better as a defense to a restoration order than it does as an answer to the original allegations of unlawful conduct. . . ." *We Can, Inc.*, 315 NLRB 170, 174-75 (1994). Even worse, PFC's argument on appeal, and the Fourth Circuit's proffered rationale, are based on "facts" neither litigated nor found below. It appears that the Fourth Circuit has done so out of a misunderstanding it shares with other circuits about the remedial orders of the Board and the Board process known as "compliance." As this Court explained in *Sure-Tan*:

> This Court and other lower courts have long recognized the Board's normal policy of modifying its general reinstatement and backpay remedy in subsequent compliance proceedings as a means of tailor-

> ing the remedy to suit the individual circumstances of each discriminatory discharge. . . . These compliance proceedings provide the appropriate forum where the Board and petitioners will be able to offer concrete evidence as to the amounts of backpay, if any, to which the discharged employees are individually entitled.

Sure-Tan, Inc., 467 U.S. at 902 (citations omitted). Here, however, the Fourth Circuit has relied upon PFC's representations in a July 18, 1997 post-decision "Objections to Proposed Judgment" pleading to the Fourth Circuit, that PFC had offered reinstatement to Manual Mantecon, Martha Hinson, Merrie Rowe, Haywood Steele, Susan Hudson and Jerry Kennedy, and that each had refused the offer in making its determination that the aforementioned discriminatees are not entitled to further back pay or reinstatement. App. 74a.

The Court of Appeals may not make factual determinations on issues never raised before the Board. 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *Garment Workers v. Quality Manufacturing Co.*, 420 U.S. 276, 281 n.3 (1975).

Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) provides:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

PFC raised, for the first time, in its Objections to Proposed Judgment, served on July 18, 1997, its assertion that PFC had made reinstatement offers to the six discriminatees named herein, that Board and UAW counsel received copies of the offers, and that none of the six accepted reinstatement. Objections to Proposed Judgment at 3. This assertion made in the Objections to Proposed

Judgment is not verified and was never raised in any other forum. There has been no opportunity for the Board or the Union to respond to these assertions. The appeals court had no jurisdiction to accept PFC's statements as facts and issue a Judgment based on those statements. This matter must be left to a compliance hearing before the NLRB, where all parties will have the opportunity to present evidence and be heard.

By truncating the Board's remedial authority, and by engaging in fact-finding in non-adversarial proceedings, the Fourth Circuit has transgressed this Court's and Congress' clear command to let the Board do its job—a job which only the Board can do and one which it in fact does. The Fourth Circuit is not the first court to misapprehend the nature of Board remedial orders and their relation to Board compliance proceedings. For example, in *We Can, Inc.*, 315 NLRB 170, 174-75 (1994), the Board held that compliance proceedings are the best vehicle to establish, on the basis of evidence which is not available at the time of the unfair labor practice hearing, that a given remedy determined by the Board may no longer be appropriate. In *We Can*, the employer had been found to have discriminatorily restructured its truck route system in order to fire eight union activists, and had been ordered to restore the route system to its former size and reinstate with back pay all the drivers it had fired. The company argued that it could not restore the route system to its former size because it had instituted new minimum pick-up load requirements which had eliminated many of its former customers. However, the Board held that since the real reason for the new minimum pick-up load requirements was found to have been to discriminate against the union activists, that rationale would not now suffice to limit the remedy. "A pretextual argument fares no better as a defense to a restoration order than it does as an answer to the original allegations of unlawful conduct, particularly where, as here, the record does not indicate that any significant capital outlay would be necessary to restore the

status quo ante." *We Can, Inc.*, 315 NLRB 170, 174-75 (1994). The Board was careful to point out that it had not ordered the employer to operate at its pre-discrimination size in perpetuity, but rather that "[t]he Respondent may lawfully restructure the [pick-up route], or eliminate it entirely, if it can show that its decision is made for legitimate business reasons." *Id.* at 175. Finally the Board noted, as is always the case, "that restoration and reinstatement will be required *unless* the Respondent can establish at compliance—on the basis of evidence that was not available at the time of the unfair labor practice hearing—that those remedies are inappropriate." *Id.* (emphasis in original, citation in footnote omitted).

In *NLRB v. Special Mine Services,* 11 F.3d 88 (7th Cir. 1993), the Seventh Circuit made the same error as the Fourth Circuit here. Neither circuit seems to understand the interplay between the Board's remedial order, and the subsequent compliance hearing which determines the facts and details of the compliance order. And both circuits fail to appreciate that Respondent counsels' arguments on appeal, referencing the status of the company long after the events which were tried in the unfair labor practice hearing, seek relief from the appellate courts on "facts" which have occurred since that unfair labor practice hearing—"facts" with which appellate courts are particularly unsuited to deal.

As the Board explained in *We Can, Inc.*:

> With all due respect for the court, we think it misperceived the nature and consequences of the restoration remedy the Board imposed in *Special Mines Services, supra.* The Board did not "defer" decision in *Special Mines Services,* and we are not "deferring" decision here. We have found, on the basis of the record made at the hearing on unfair labor practices, that the Respondent has not shown that restoration [of the work it discriminatorily curtailed]—the presumptively appropriate remedy for

> its discriminatory restructuring of the [work] and the firing of its drivers—is inappropriate. Accordingly, we are ordering the Respondent to restore the status quo ante and to offer to reinstate the discharged drivers. That is our decision. We recognize, however, that in this case, as in almost any case, evidence may come to light after the close of the record in the unfair labor practice hearing that may, if credited and found sufficiently material, establish that some portion of the remedy imposed by the Board is no longer appropriate. . . . Our directing the Respondent to restore the status quo ante, unless it can prove at compliance that restoration and reinstatement are no longer appropriate, is not a "deferral" of our decision. It is simply an explicit recognition of the reality that the appropriateness of almost any affirmative remedy may change over time, and an effective mechanism for amending this particular remedy should the need arise.

We Can, Inc., at 175-76. The footnote which follows this explanation, further elucidates what both the Seventh and Fourth Circuits failed to understand.

> In this regard, almost any Board Order might be characterized as provisional, in that all parties understand that, should events overtake some portion of the order, that portion can be modified at compliance to reflect the changed conditions. The only difference here is that the Respondent asserts that such changes already have occurred. . . .

Id. at n. 27. The Board has elaborate rules and regulations, which provide for a full hearing for all interested parties, to engage in new fact finding, and to appeal any adverse findings. See NLRB RULES AND REGULATIONS §§ 102.52-.55 (1992), App. 78a-80a.

PFC's contention, adopted by the Fourth Circuit, is that in the time since the unfair labor practice hearing, three or more years have passed and more than 300 employees have been subjected to the illegal disciplinary system.

These "facts," alleged only in pleadings subsequent to the unfair labor practice hearing, are properly assessed only in a compliance proceeding and not before an appellate court. Only after PFC has demonstrated in compliance proceedings that new facts justify a revision to the scope of the Board's original remedy, does the Fourth Circuit's view become legitimate. PFC cannot litigate compliance issues at the liability stage of a case.

III. THE ERRONEOUS DECISION IN THIS CASE IS PROVIDING PRECEDENT FOR FURTHER ERROR.

As this petition has pointed out, this Court and most appellate courts have held that rescission of an illegally adopted policy, and reinstatement with back pay of all those affected by it, regardless of union affiliation, is the appropriate remedy in a case such as the one here. But the Fourth Circuit decision in this case cannot be viewed as a mere aberration or isolated mistake. Not only did the *en banc* court deny rehearing, App. 71a, but on December 27, 1997, another panel of the Fourth Circuit repeated the same mistake in *Eldeco, Inc. v. NLRB*, 1997 WL 790517 (4th Cir.).

In *Eldeco*, as in this case, the Fourth Circuit found that the Board's findings of unfair labor practices were supported by substantial evidence. And in *Eldeco*, as in this case, the Fourth Circuit found that substantial evidence supported the Board's finding that Eldeco adopted a new drug-testing policy in response to a union organizing drive but that there was no evidence that it was disparately enforced against union sympathizers." *Id.* at * 4. Therefore, as in this case, the Fourth Circuit held: 'We therefore refuse to punish a company for implementing a drug testing program which is a good safety device and a valid public policy decision when there is no evidence of discriminatory enforcement. . . . Accordingly, we deny any recovery related to the drug testing policy." *Id.* Judge

Hall's dissent takes issue with the Fourth Circuit's independent decision-making about what policies the Board may and may not enforce:

> [W]e ought not—and in my view, we cannot—forgive Eldeco's illegal motivation because drug testing of electricians in Winston-Salem strikes us as a good idea. We have no role in setting the terms and conditions of employment . . . . It is quite beside the point that drug testing might be a "good safety device" or a "valid public policy decision. . . . The goodness and validity of work rules are in the eye of the employer, and their promulgation is its prerogative, with the one big exception relevant here: rules intended to interfere with employees' free exercise of § 7 rights are illegal.

Id. at * 10. As in *Performance Friction*, the Fourth Circuit refused to provide any relief to employees harmed by an illegally motivated policy.

The Fourth Circuit has now twice embarked on a dangerous course of supplanting its knowledge of a case, twice removed from the unfair labor practice hearing, for that of the Board. It has also, in violation of statute and precedent, substituted its uninformed choice of remedies for that of the Board. These practices must cease.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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February 17, 1998

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-3151

PERFORMANCE FRICTION CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS, AFL-CIO, CLC,
Intervenor.

No. 96-1096

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PERFORMANCE FRICTION CORPORATION,
Respondent,

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS, AFL-CIO, CLC,
Intervenor.

On Petition for Review and Cross-application
for Enforcement of an Order
of the National Labor Relations Board
(11-CA-16040)

Argued: March 6, 1997
Decided: June 30, 1997

OPINION

LUTTIG, Circuit Judge:

Petitioner Performance Friction Corporation appeals from the judgment and order of respondent National Labor Relations Board finding that petitioner violated sections 8(a)(1) and (a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (3), by instituting a new disciplinary system in order to discourage union activity and by discharging pro-union employees under that new system. For the reasons stated herein, we affirm the Board's conclusions of violation, but remand for the Board to fashion a more narrowly tailored remedy.

I.

Performance Friction manufactures high-performance, non-asbestos automotive disk brake pads for major automotive manufacturers and for professional race car teams appearing in the Nascar Winston Cup and Indianapolis 500. J.A. at 859. Since 1986, when current owner and president Donald Burgoon acquired the company, Performance Friction's workforce has grown rapidly, from approximately 25 employees in 1986, to 100 employees in 1989, and to nearly 400 workers in 1994. J.A. at 731, 753, 859. Performance Friction attributes its growth to a commitment to quality which, according to former employee and union activist Susan Hudson, was almost fanatical. J.A. at 201; *see also* J.A. at 962. Over the course of this period of growth, Performance Friction's annual turnover rate has been high, the company discharging and replacing virtually its entire workforce annually. J.A. at 378, 881.

In November 1993, several months before union activity at the company began, Performance Friction put into place a new compensation plan designed to increase worker productivity. Under this plan, employees were assigned to one of seven pre-defined pay levels. From this pre-defined level, employees could advance by taking and passing, at their own pace, certain job-related tests, rather than await end-of-the-year evaluation. J.A. at 333-35, 452, 491-92. Shortly after this plan was instituted, Performance Friction's "scrap rate" (the monthly amount of scrap material as a percentage of total production, J.A. at 353-54), improved from 10.9% in December 1993 to 4.2% in April 1994, dropping to a low of 2.7% in October 1994. J.A. at 1055.

In early February 1994, the United Automobile, Aerospace, Agricultural Implement Workers of America (the "Union") began efforts to unionize Performance Friction's 400-member workforce. Burgoon, aided by Mike Ford, his assistant production manager and second-in-command of the company, opposed the Union through what it now concedes were unlawful practices.[1]

Either shortly before or shortly after the unionization effort began, the company implemented a new and more strict disciplinary system which would make it easier for Performance Friction to discharge employees. J.A. at 864. Under the old disciplinary system, an employee

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[1] Performance Friction, for example, does not challenge that it illegally

> threatened employees that it would be futile for them to select the Union as their collective bargaining representative; impliedly threatened to reduce wages if employees selected the Union to represent them; interrogated employees about their union sympathies and activities, and the activities and sympathies of fellow employees; solicited grievances from employees and expressly or impliedly promised to remedy those grievances in order to discourage union activities among employees.

J.A. at 884, 915.

would be suspended without pay for three days if he committed two major violations in 30 days, and would be discharged for a third violation within the 30-day period. J.A. at 864. The new system, which was designed to operate in tandem with the new pay level structure and advancement plan, eliminated the 3-day suspension and allowed Performance Friction to discipline employees for committing fewer violations over a longer period of time. Thus, an employee who committed either two major violations in 90 days or three major violations in six months would be demoted one pay level, or, if he was already at the lowest pay level, would be discharged. J.A. at 864.

It is not clear how many employees have been discharged under the new disciplinary system since its institution. However, Performance Friction had, between April 19, 1994, and the time this case was heard by the administrative law judge in December 1994, discharged a total of approximately 180 employees; and, according to its counsel, the company has now terminated over 300 employees total. J.A. at 1102-05; Petitioner's Reply Br. at 10 n.3. Among the first individuals discharged under the new disciplinary system were union activists Martha Hinson, Jerry Kennedy, Merrie Rowe, Hayward Steele, and Susan Hudson, and they were all discharged between April 19 and May 24 of 1994. J.A. at 1103. In addition, union supporter Manuel Mantecon was discharged on May 30 for not returning to work after having been on medical leave. J.A. at 1102.

In response to these discharges, the Union commenced this litigation on May 23, 1994, initially claiming only that the six union activists listed above had been illegally discharged. Later, however, after discovering that other employees also had been discharged under the new disciplinary system, the Union expanded its claims through a second amended complaint, which charged as follows:

> On or about 4-19-94. [Performance Friction] discriminatorily implemented a more [stringent] disciplinary policy in order to discourage support for, and activities on behalf of the union.
>
> Pursuant to this unlawfully implemented disciplinary policy, the employer discharged . . . [five of the six union activists (excluding Mantecon), as well as Kyle Meyers, Leslie Teague, Michael Thompson, Nedra Stewart, and Bernard Young.]
>
> The employer discharged [the six union activists] because of their membership in, and or activities on behalf of the union.

J.A. at 926.

At trial, Performance Friction moved to dismiss the claims of Meyers, Teague, Thompson, Stewart, and Young, on the ground that the General Counsel presented no evidence at all regarding these individuals and, specifically, no evidence regarding their affiliation with or sympathy for the Union. J.A. at 308. The administrative law judge denied the motion, and, instead, permitted the General Counsel to expand the charge yet further, so as also to allege company violations against "all other unknown and unnamed people" discharged under the new disciplinary system. J.A. at 314, 904 n.1. At the conclusion of the hearing, the ALJ held for the General Counsel, finding, as modified by the Board, that Performance Friction had "instituted a new and more strict disciplinary system in response to employee union activity both to discourage such activity and to rid itself of Union activists," J.A. at 884, and that, pursuant to this system, the company had "discharged union activists and employees Martha Hinson, Merrie Rowe, Haywood Steele, Susan Hudson, Jerry Kennedy, Kyle Meyers, Bernard Young, Leslie Teague and others," in violation of sections 8(a)(1) and (3) of the National Labor Relations Act.[2] J.A. at

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[2] Sections 8(a)(1) and (3) of the National Labor Relations Act provide that

902. The ALJ and Board also found that the company had discharged Manuel Mantecon because of his union activities, in violation of the Act, albeit not under the new system. J.A. at 902.[3]

The Board ordered Performance Friction to "[c]ease and desist from . . . [i]nstituting a new and stricter disciplinary system in response to employee union activity to discourage such activity or to rid itself of union activists," J.A. at 903, and, in addition, to not only reinstate those named individuals as to whom the General Counsel presented proof of unlawful discrimination, but to re-instate, with backpay, *all* individuals who were discharged under the new disciplinary system. Thus, the Board ordered Performance Friction to take the following "affirmative action":

> (a) Rescind the new and stricter disciplinary system which was instituted by [Performance Friction] in response to employee union activity.
>
> (b) Rescind any disciplinary action taken pursuant to the stricter disciplinary system which system [Per-

---

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

29 U.S.C. § 158(a)(1),(3).

[3] The Board omitted Michael Thompson and Nedra Stewart because the record did not establish that they were discharged under the new disciplinary system. However, under the Board's order, the General Counsel would have the opportunity, in the compliance stage of the litigation, to establish that Thompson, Stewart, or any other employee, was discharged under the new system, and hence, illegally. J.A. at 902 n.2.

formance Friction] instituted in response to employee union activity.

(c) Offer Manuel Mantecon, who was unlawfully discharged for engaging in union activities, and Martha Hinson, Merrie Rowe, Haywood Steele, Susan Hudson, Jerry Kennedy, Kyle Meyers, Bernard Young, Leslie Teague, and any other employee unlawfully discharged pursuant to the new disciplinary system, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges; and to make them whole with backpay . . . plus appropriate interest, for any loss of earnings they may have suffered as a result of the discrimination against them.

J.A. at 903. As to the unnamed individuals, Performance Friction would have the opportunity, during the compliance phase of the litigation, to prove that they would have been discharged even under the old disciplinary system; otherwise, Performance Friction was required to re-instate them with backpay regardless of their union affiliation. J.A. at 885, 902 n.2.

On appeal, Performance Friction first argues that the Board's findings that Performance Friction instituted the new disciplinary system unlawfully and that it unlawfully discharged union activists under that system and because of their union activity are not supported by "substantial evidence." Performance Friction argues, second, that the Board's order, that Performance Friction rescind the new system and re-hire all employees discharged under it, is overbroad.

II.

Notwithstanding Performance Friction's arguments to the contrary, "substantial evidence," *see McLean Trucking* v. *NLRB*, 719 F.2d 1226, 1227 (4th Cir. 1983), supports the Board's conclusions that the company unlaw-

fully implemented its new disciplinary system on April 19, 1994—shortly after the Union began organizing the company's workforce—in order to discriminate against the Union and union adherents, *see NLRB* v. *Frigid Storage*, 934 F.2d 506, 510 (4th Cir. 1991) ("A new system for discipline violates the Act if implemented in retaliation for union activity."); *see also Electri-Flex Co.* v. *NLRB*, 570 F.2d 1327, 1334 (7th Cir.), *cert. denied*, 439 U.S. 911 (1978), and that the company then proceeded to use that system to unlawfully discharge known union supporters Hinson, Kennedy, Rowe, Steele, and Hudson. The Board's conclusion that Performance Friction discharged Mantecon in violation of the National Labor Relations Act is likewise supported by substantial evidence.

Performance Friction's assertion that it implemented the new disciplinary system in November 1993 (before the arrival of the Union and therefore independent of any union activity), at the same time it implemented its new compensation system, is belied by considerable evidence. First, Mike Ford himself testified in sworn affidavit that the new disciplinary system had been implemented in April 1994. J.A. at 977. Although Ford later recanted that testimony at trial, J.A. at 72, we cannot say that the Board erred in crediting Ford's sworn affidavit over his eleventh hour recantation. Moreover, Ford's affidavit testimony was corroborated by the fact that, as the administrative law judge found, between November 1, 1993 and April 19, 1994, "[n]o fewer than 11 instances of discipline were issued . . . not only on forms used under the old system, but clearly utilizing the rules of the old system." J.A. at 868. For example, on January 1, 1994, an employee named Jerry Wright was charged with a "minor" violation for failing to properly complete quality paperwork, J.A. at 1360, even though under the new disciplinary system that violation would have been categorized as "major." J.A. at 964. Furthermore, prior to April 1994, the handbooks that Performance Friction distributed to new employees still included the rules for the old disciplinary system. J.A. at 161.

Substantial evidence also supports the Board's finding that Performance Friction used this new system to discourage union activity and thin its ranks of union activists by unlawfully discharging Hinson, Kennedy, Rowe, Steele, and Hudson. Performance Friction does not contest that, as to all of these individuals except Steele, it was fully aware of their pro-union sentiments. *See Goldtex Inc.* v. *NLRB*, 14 F.3d 1008, 1011 (4th Cir. 1994) (describing "the most basic element of an unlawful discharge—namely, that the employer [be] aware of the discharged employee's protected activities."); *see also* J.A. at 277-78, 364, 377, 797-99. And the Board could have inferred that Burgoon and Ford were aware that Steele, too, was pro-Union, from the fact that Steele's supervisor knew of his pro-union sentiments, J.A. at 88-91, and that Steele reported to the police that he had witnessed Burgoon and Ford nearly run over two Union activists with their truck, J.A. at 93. Moreover, all of these individuals were among the very first employees disciplined and discharged under the new system, and each of their discharges were for questionable violations of company policy. Hinson was discharged for violating the seldom-enforced rule of not wearing safety glasses. J.A. at 138. Rowe was discharged after missing work because she could not find a baby-sitter to care for her child, even though other employees were permitted to miss work under similar circumstances. J.A. at 284-85. Hudson was disciplined for making a defective product, even though she had earlier been commended for spotting the defect in that very product, and notwithstanding the fact that she was operating a malfunctioning machine. J.A. at 182-84. Steele, who was discharged just one week after reporting the truck incident to the police, J.A. at 94, was cited for completing faulty paperwork; however, unlike with past instances, Steele's supervisor refused to show him the alleged errors. J.A. at 101-02. Finally, although the evidence against Kennedy was the weakest, even there, Kennedy was issued a violation for missing Saturday work where he himself

did not actually sign up for it, but, rather, was signed up for it by his supervisor. J.A. at 593-94.

Similarly, although Mantecon was not discharged under the new disciplinary system, substantial evidence supports the Board's conclusion that he, too, was fired in retaliation for his pro-Union activities. As with the others, Performance Friction was aware that Mantecon was actively pro-Union, J.A. at 798, and it discharged him under suspicious circumstances. When Mantecon returned to work after an authorized sick leave, the company told him that he had been discharged over three weeks earlier on May 4, 1994, J.A. at 251, even though his authorized period of convalescence did not end until May 18, J.A. at 969, and notwithstanding the fact that several company documents indicate that he was discharged on May 30, J.A. at 965, 1102.

We therefore affirm the Board's findings that Performance Friction implemented the new disciplinary system in order to discourage union activity and rid itself of union activists, and that the company then proceeded to discharge certain known union activists pursuant to that system and/or in retaliation for their pro-union activities.

III.

Although the Board did not err in determining that Performance Friction violated sections 8(a)(1) and (a)(3) of the Act, we believe the Board did exceed its remedial authority when it ordered Performance Friction to cease and desist from enforcing, and actually rescind, the new disciplinary system, and to reinstate with backpay *all* employees who had been discharged under that system, whether or not anti-union animus underlay their discharges.

Although the Board's remedial power is broad, encompassing the power to order "such affirmative action including reinstatement of employees with or without back pay, as well effectuate the policies" of the Act, 29 U.S.C.

§ 160(c); *see also NLRB* v. *Williams Enterprises*, 50 F.3d 1280, 1289 (4th Cir. 1995), that broad authority is not without "limitations." *See, e.g., Ultrasystems Western Constructors* v. *NLRB*, 18 F.3d 251, 258 (4th Cir. 1994); *cf. Sure-Tan Inc.* v. *NLRB*, 467 U.S. 883, 900 (1984). Among those limitations, an "order . . . must . . . be congruent with the scope of discrimination, so that its enforcement neutralizes the discrimination, and does not go beyond." *Ultrasystems*, 18 F.3d at 259.

Here, the Board's order that the company permanently rescind its disciplinary policy and rehire all employees discharged under that policy exceeds the scope of the Board's remedial authority. That an employer may have instituted a broad business plan out of anti-union animus simply does not *ipso facto* establish that the enforcement of the provisions of that plan thereafter constitutes anti-union discrimination. In other words, it does not follow from the fact that a company adopts a particular policy out of impermissible motives, that its application of that policy in all instances will have the impermissible discriminatory effects reached by the Act. This is to say, of course, no more than that a policy or plan may be instituted for prohibited reasons (and therefore run afoul of the Act's proscriptions) yet be both facially neutral and enforced nondiscriminatorily.

Accordingly, an order like that entered by the Board in this case, which essentially *presumes* discrimination by the company in its discharges under a facially neutral business plan, exceeds even the Board's concededly broad remedial authority. It is only slight hyperbole that such an order is the equivalent of a hostile government take-over of a company through administrative agency regulation. Were we to place our imprimatur on such an order, we would in effect be acquiescing in the Board's substitution of its own "business judgment" for the employer's legitimate business judgment, in contravention of our established precedent that, "[w]here . . . there is no evidence that the company discharged particular employees in order

to discourage union membership or activities, the company is entitled to its own assessment of an employee's worth, an assessment which must be respected by the Board." *Goldtex Inc.*, 14 F.3d at 1012; *see also NLRB* v. *Wright-Line*, 662 F.2d 899, 903 (1st Cir.), *cert. denied*, 455 U.S. 989 (1982) (warning against restricting an "employer's freedom to apply legitimate performance standards").

Indeed, this case is paradigmatic of the perniciousness of such an overly broad remedial order. There is absolutely no evidence that any individual other than the five known Union activists discharged under the new disciplinary system, was so discharged because of his union affiliation or sympathies. The evidence does not even reveal whether the unknown individuals whom the Board has ordered the company to rehire were pro-Union, ambivalent towards the Union, or ardent opponents of the Union. Yet, the Board order requires Performance Friction not only to rehire with backpay all of these identified and unidentified individuals, but also rescind the company's entire personnel disciplinary system, a system which the Board does not even suggest facially discriminates against pro-union employees, and as to which no finding of discriminatory application has been made beyond the five individual instances which occurred in the one-month period. The folly of such an order is borne out by the NLRB counsel's acknowledgment at argument that Performance Friction could rescind its "unlawful" disciplinary policy on one day and lawfully reimplement the exact same plan the next day, provided that the company satisfies the Board that it has been purged of its malevolence toward the union.

In recognizing that the Board exceeds the outer limits of its authority when issuing orders of the type at issue here, we are not alone among our sister circuits. In two cases directly analogous to the case *sub judice*, for example, the District of Columbia Circuit similarly vacated the

Board's remedial orders and remanded with instructions to tailor the orders more narrowly so as not to prohibit *lawful* employer activity. *See McGraw-Edison Co.* v. *NLRB*, 533 F.2d 1266, 1268-69 (D.C. Cir. 1976); *Gold Coast Restaurant* v. *NLRB*, 995 F.2d 257, 268-69 (D.C. Cir. 1993). In those cases, the Board concluded, and the court affirmed, that the companies had unlawfully instituted disciplinary and warning systems in order to discriminate against the unions, *see* 533 F.2d at 1268; 995 F.2d at 267-68, just as we have concluded here that substantial evidence supports the Board's conclusion that Performance Friction instituted its disciplinary system in order to discriminate against the Union. In each of these cases, the District of Columbia Circuit held that the Board's remedies—which required the companies *inter alia* to cease and desist from "[o]rdering supervisors to issue written warnings to employees suspected of engaging in union activities." 533 F.2d at 1266-67 n.1, and "instituting a formal written warning system because its employees engaged in activities on behalf of the Union." 995 F.2d at 268—were overbroad because they "[caught] within [their] sweep not only prohibited conduct such as that which formed the basis for the finding of unfair labor practices here, but a number of otherwise valid management practices." 533 F.2d at 1268. As a consequence of the overbreadth of the Board's orders, the court reasoned, the employers would have been prevented "from making future changes in [their] disciplinary system[s] in a non-retaliatory fashion." 995 F.2d at 268, and "prohibit[ed] [from issuing] written warning[s] and [taking] numerous other supervisory actions which have no relation to union activity," *see* 533 F.2d at 1269.

In both *McGraw-Edison* and *Gold Coast Restaurant*, the court required the Board to amend its orders in precisely the way that we require the Board to modify its orders herein. The court required the Board to refashion its orders so that the employers could take any of the

actions prohibited by the Board's original orders, provided that the actions were taken for legitimate business purposes unrelated to the employees' union activities; that is, so that the orders "recognize[d] the area in which the company [could] properly operate" free from agency interference. *See McGraw-Edison,* 533 F.2d at 1269.

Thus, in *McGraw-Edison*, the court required the Board to modify its order that the employer cease and desist from "[o]rdering supervisors to issue written warnings to employees suspected of engaging in union activities," *so as to include an exception "for good cause unrelated to union activity"*; its order to cease and desist from "[m]aintaining surveillance over employees suspected of engaging in union activities," *so as to include the same execption*; its order to cease and desist from "[i]ssuing permanent written warnings, contrary to past plant practice, to union sympathizers when suspected of engaging in union activities," *so as to allow the company to "change its practice[s] . . . upon proper notice and for reasons unrelated to union activity"*; its order to cease and desist from "[o]therwise threatening union sympathizers with discharge for engaging in union activities," *so as not to prevent the company from "threaten[ing] [employees] with or actually discharg-[ing] [them] for good cause unrelated to union activity"*; and, most significantly for purposes of the case before us, its order to cease and desist from "[t]ightening up enforcement of plant rules in order to discourage union activities among its employees," *so as to respect the company's right to "tighten up" enforcement of plant rules "for reasons unrelated to union activity." See* 533 F.2d at 1269 n.8.

In *Gold Coast Restaurant*, the court similarly directed the Board to modify its order restraining the employer from "instituting a formal written warning system because its employees engaged in activities on behalf of the Union," *so as only to prohibit the employer from instituting such a warning system "in order to harass, intimidate or retaliate against employees engaged in union activities"*, and its order to cease and desist from "issuing written

warnings to its employees pursuant to the written warning system," *so as only to prohibit the employer from issuing such warnings "in order to harass, intimidate or retaliate against employees engaged in union activities." See* 995 F.2d at 263, 267, 269.

In accord with these authorities, and for the reasons explained, we likewise vacate the Board's remedial order in this case and remand with directions to the Board to modify its order against Performance Friction so as to permit the company to retain in effect its disciplinary policy implemented on April 19, 1994, unless substantial evidence develops that that policy is being enforced in a manner discriminatory toward the Union or the company's pro-union employees. Additionally, the Board's revised order should not require the company to reinstate with backpay, Kyle Meyers, Bernard Young, Leslie Teague, Michael Thompson, and Nedra Stewart, or any other employee except those discussed in Part II *supra*, until such time as it is proven that their discharges were the consequence of their pro-Union affiliation or sentiments.

The judgment of the Board is affirmed in part and reversed in part, and the case is remanded with instructions to fashion a remedial order consistent with this opinion and with the powers conferred upon the Board.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 11-CA-16040

PERFORMANCE FRICTION CORPORATION *and* UNITED AUTOMOBILE, AEROSPACE, & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

November 30, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On April 6, 1995, Administrative Law Judge Philip P. McLeod issued the attached decision. The Respondent filed exceptions and a supporting brief, the Union filed a brief in response to those exceptions, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 363 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has also excepted to the judge's decision asserting that the judge, through his comments at the hearing, rulings, and decision, demonstrated bias and prejudice against it. Upon our

modified,[2] and to adopt the recommended Order as modified.

The Respondent has excepted to the judge's decision to grant the General Counsel's midhearing motion to amend the complaint to add to the list of discriminatees disciplined under its revised disciplinary policy, those "similarly situated employees known to Respondent but presently unknown to the General Counsel." We adopt the judge's decision. Thus, the General Counsel moved to

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full consideration of the entire record in these proceedings, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent at the hearing or in his analysis and discussion of the evidence.

In adopting the judge's finding that the Respondent implemented its new disciplinary system in April 1994, we do not draw an adverse inference from the Respondent's failure to call, as witnesses, employees who it alleged attended committee meetings where the new disciplinary rules were formulated.

For purposes of our decision, we find it unnecessary to resolve whether the Respondent's owner, Donald Burgoon, admitted that his truck left tire marks during an April 28, 1994 incident.

[2] Consistent with the judge's analysis we have modified the Conclusions of Law, Order, and notice to provide that the Respondent additionally violated Sec. 8(a)(3) and (1) by: (1) terminating employees Kyle Myers, Leslie Teague, and Bernard Young pursuant to its new disciplinary system; and (2) terminating employee Manuel Montecon for engaging in union activities, and to discourage support for the Union. As to Montecon, it was neither alleged in the complaint nor established in the record that he was additionally discharged under the unlawfully revised disciplinary system.

We have not included Michael Thompson and Nedra Stewart as discrminatees because the record does not establish that they were discharged on or after April 19, 1994, when the judge found that the revised policy took effect. The General Counsel, however, has the opportunity in compliance to establish that Thompson, Stewart, or, indeed, any other employee, was unlawfully discharged on or after April 19 pursuant to the revised disciplinary policy.

Finally, consistent with the judge's proposed remedy, we have modified the recommended Order and notice to specify that all discipline meted out under the revised disciplinary system, including discharge, is unlawful.

amend the complaint immediately after the Respondent asserted that there were employees, beyond those named in the complaint, who had been disciplined under the revised rule. As this motion was made before the Respondent put on its case, it had an adequate opportunity to address the expanded class issue. Further, although the judge inadvertently failed to rule on this motion until his decision, he notified the Respondent when the motion was made that: he intended to grant it; that the Respondent should consider itself on notice that the General Counsel was broadening the class of discriminatees; and that it should litigate the case accordingly.[3]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 5.

"5. Pursuant to its new and stricter disciplinary system, the Respondent discharged union activists and employees Martha Hinson, Merri Rowe, Haywood Steel, Susan Hudson, Jerry Kennedy, Kyle Meyers, Bernard Young, Leslie Teague and others in violation of Section 8(a)(3) and (1) of the Act."

2. Insert the following as a new Conclusion of Law 6, and renumber the succeeding section.

"6. The Respondent discharged Manuel Montecon because of his union activities and to discourage such activity in violation of Section 8(a)(3) and (1)."

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[3] We find that the cases relied on by the Respondent are distinguishable. We also find that *Sumo Airlines*, 317 NLRB 383 (1995), does not require a contrary result. In *Sumo Airlines*, the General Counsel was not permitted, after the hearing, to expand the class of discriminatees to include an additional employee beyond those named in the complaint and stipulated to by the parties. Here, however, the General Counsel promptly moved to amend the complaint, and the Respondent had the full opportunity to litigate the amended allegation at the hearing. In addition, in compliance, the Respondent has the opportunity to show that it would have taken the same action towards any of the additional unnamed discriminatees, even without the revised disciplinary policy.

ORDER

The National Labor Relations Board orders that the Respondent, Performance Friction Corporation, Clover, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that it would be futile for them to select the Union as their collective-bargaining representative; expressly or impliedly threatening to reduce wages if the employees select the Union to represent them; interrogating employees about their union sympathies and activities, and the activities and sympathies of fellow employees; soliciting grievances from employees and expressly or impliedly promising to remedy those grievances in order to discourage union activities among employees.

(b) Instituting a new and stricter disciplinary system in response to employee union activity to discourage such activity or to rid itself of union activists.

(c) Issuing warnings, discharging, or taking other disciplinary action against any employees for engaging in protected concerted or union activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the new and stricter disciplinary system which was instituted by the Respondent in response to employee union activity.

(b) Rescind any disciplinary action taken pursuant to the stricter disciplinary system which system the Respondent instituted in response to employee union activity.

(c) Offer Manuel Montecon, who was unlawfully discharged for engaging in union activities, and Martha

Hinson, Merri Rowe, Haywood Steel, Susan Hudson, Jerry Kennedy, Kyle Myers, Bernard Young, Leslie Teague, and any other employees unlawfully discharged pursuant to the new disciplinary system, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges; and make them whole with backpay to be computed in the manner prescribed in *F. W. Woolwrth Co.*, 90 NLRB 289 (1950), plus appropriate interest, for any loss of earnings they may have suffered as a result of the discrimination against them.

(d) Remove from its files any reference to the warnings, discipline, and discharges found unlawful, and notify each of the individuals so warned, disciplined, or discharged, in writing, that this has been done and that evidence of the unlawful conduct will not be used as a basis for future personnel actions against any of those individuals.

(e) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Clover, South Carolina facility copies of the attached notice marked "Appendix."[4] Copies of this notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places

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[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. November 30, 1995

MARGARET A. BROWNING, Member

CHARLES I. COHEN, Member

JOHN C. TRUESDALE, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid and protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees that it would be futile for them to select the Union as their collective-bargaining representative; expressly or impliedly threaten to reduce wages if employees select the Union to represent them; interrogate employees about their union sympathies and activities and the activities and sympathies of fellow employees; solicit grievances from employees and expressly or impliedly promise to remedy those grievances in order to discourage union activities among employees.

WE WILL NOT institute a new and stricter disciplinary system in response to employee union activity to discourage such activity or to discharge union activists.

WE WILL NOT issue warnings, discharge, or take other disciplinary action against any employee for engaging in protected concerted or union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the new and stricter discipilnary system.

WE WILL rescind any disciplinary action taken pursuant to the stricter disciplinary system.

WE WILL offer Manuel Montecon, Martha Hinson, Merri Rowe, Haywood Steel, Susan Hudson, Jerry Kennedy, Kyle Myers, Bernard Young, Leslie Teague, and any other employees discharged pursuant to the new disciplinary system, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges and WE WILL make them whole, with appropriate interest, for any loss of earnings they may have suffered as a result of the actions against them.

WE WILL remove from our files any reference to the warnings, discipline, and discharges found unlawful, and notify each of the individuals so warned, disciplined, or discharged, in writing, that this has been done and that the warnings, discipline, or discharge will not be used against them in any way.

PERFORMANCE FRICTION CORPORATION

DECISION

STATEMENT OF THE CASE

PHILIP P. MCLEOD, Administrative Law Judge. I heard this case in York and Rock Hill, South Carolina, on December 5, 6, 7, and 8, 1994. The underlying charge was filed on May 23, 1994, and later amended. A complaint and notice of hearing issued on July 8, 1994.

This case concerns allegations Respondent unlawfully threatened employees that it would close its plant before a union would be allowed to represent employees; that it would be futile for employees to select the Union as their representative; that Respondent would reduce wages and benefits of employees if they selected the Union to represent them; that Respondent interrogated employees in order to ascertain their union sentiments; that Respondent solicited grievances from employees and expressly or impliedly promised to remedy those grievances in order to discourage unionization; that Respondent instituted a new disciplinary system during the union campaign which was more stringent than its prior policy, and, pursuant to the new policy, discharged various employees in order to thin its ranks of union supporters.

In its answer to the complaint, Respondent admitted certain allegations, including the filing and serving of the charges; its status as an employer within the meaning of the Act; the status of United Automobile, Aerospace, Agricultural Implement Workers of America (UAW) as a labor organization within the meaning of the Act and the status of certain individuals as supervisors and agents of Respondent within the meaning of Section 2(11) of the Act. Respondent denied having engaged in any conduct which would constitute an unfair labor practice within the meaning of the Act.

At the trial herein, all parties were represented and afforded full opportunity to be heard, to examine and

cross-examine witnesses, and to introduce evidence.[1] Following the close of the trial, all parties filed timely briefs which have been duly considered. Upon the entire record in this case and from my observation of the witnesses, I make the following

Findings of Fact

I. JURISDICTION

Performance Friction Corporation is a South Carolina corporation which manufactures and sells nonasbestos disk brake pads. In the course and conduct of its business, Respondent annually purchases and receives at its South Carolina facility goods and materials valued in excess of $50,000 directly from points located outside the State of South Carolina. Respondent also annually sells and ships from its South Carolina facility products valued in excess of $50,000 directly to points located outside the State of South Carolina.

Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

United Automobile, Aerospace, Agricultural Implement Workers of America (UAW) is, and has been at all times

[1] At the conclusion of counsel for the General Counsel's case, he moved to amend the complaint in certain particulars. Respondent objected to the amendment. When I stated that I was prepared to grant the motion, Respondent's counsel specifically requested that I not rule on the motion to amend the complaint until Respondent had concluded its evidence. I informed Respondent that I would not grant counsel for the General Counsel's motion to amend the complaint at that time, but only because of Respondent's request. I informed Respondent that it should assume for purposes of putting in its evidence that it was required to address such issues. I inadvertently failed to grant the motion at the conclusion of the trial, and therefore counsel for the General Counsel's motion to amend the complaint is now granted.

material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

At its facility in Clover, South Carolina, Performance Friction manufacturers nonasbestos disk brake pads and other friction materials. Performance Friction sells its brake pads directly to automobile manufacturers such as Ford Motor Company and to wholesalers and retailers in the replacement parts market. Other customers include many of the Nascar Winston Cup, Indianapolis 500, and IMSA racing teams.

Respondent's president and production manager is Don Bugoon, who acquired the company from his father. Burgoon moved the manufacturing facility from its former site in Ohio to the current facility in Clover, South Carolina. Since that time, Respondent has grown from approximately 25 employees in 1986 to nearly 400 employees in 1994.

There is no dispute about the fact that long before any union organizing activity at Respondent's facility, and in spite of extremely high employee turnover, Respondent produces what is recognized as a quality product. Otherwise, it would not be so widely used under such extreme racing conditions. An article on the Company that appeared in Under Car Digest, a magazine/trade publication, shows that a commitment to quality has long been touted by Respondent.

The Union began its organizing activities at Respondent in early February 1994. Burgoon himself admitted that he became aware of those activities in February. When asked if he was against the union, Burgoon also admitted, "I am. I was, I am." Burgoon admitted that he did not hesitate to let his employees know he was against the Union. Assistant Production Manager Michael

Ford also admitted being against the Union and that he was disturbed by employees distributing union handbills on Respondent's premises. Burgoon and Ford also admitted trying to keep track of the employees who supported the Union. Burgoon testified, "We were always trying to be aware if there was a vote, where we would stand." Ford testified that he heard numerous rumors about who was active on behalf of the Union, and that he consistently passed that information on to Burgoon. Burgoon recalled specifically that he heard employees Susan Hudson, Jerry Kennedy, and Manuel Montecon were engaged in union activities.

B. *March 1994: Respondent's Meetings with Employees*

Martha Hinson and Susan Hudson testified that on or about March 2, Burgoon and Assistant Production Manager Ford conducted a meeting in Respondent's warehouse for all first- and second-shift employees where they addressed the union campaign. According to Hinson, the meeting included everyone on first and second shift, totaling approximately 100 to 150 employees. Hinson and Hudson testified that Burgoon told the assembled employees he had heard a rumor that the Union was trying to organize the plant. Burgoon stated that he wanted to "nip it in the bud." Hinson testified that Burgoon stated he would do everything in his power "legally or otherwise" to stop the Union. Hinson testified that Burgoon asked rhetorically what the Union could do for employees, and then replied himself "that it wouldn't do nothing for us because the plant would be closed, that there was no union coming in there, [and] that he would close the plant before a union would come in."

During the meeting, an employee asked about the negotiation process. According to both Hinson and Hudson, Ford answered, "We'll negotiate wages. How much do you want to lower them," adding, "Yes, we'll negotiate. No, no, no." Hudson admitted that somewhere in the context of those remarks, Burgoon made the statement

that in negotiations, "Pay could go either way, up or down." Hinson also testified credibly that Ford or Burgoon said employees would be required to pay union dues, that they would be paying someone else to do their talking for them, and that Respondent "could lower wages" as a result of the collective-bargaining process. Apparently it was then, according to Hudson, that Burgoon said, "Here's my negotiations. No, no, hell no."

Burgoon and Ford both denied that Burgoon threatened plant closure in the event of unionization. Burgoon testified that in one of the meetings he held with employees, not necessarily this meeting, he simply opined that one of the reasons unions were not beneficial to employees was because they could not prevent a plant closing. Burgoon denies threatening that he would close the plant if employees became unionized. Burgoon admits simply that he told employees of a Ford plant he knew which was unionized, and was closed. Similarly, Ford testified, "Don [Burgoon] gave an example of a company going out of business in Canton, Ohio when the [union] came in. [Burgoon] just said that he remembers as a child, or when he was younger that the Union came into a plant and then later the plant shut down." Burgoon denied ever threatening to reduce wages, and both Burgoon and Ford denied Burgoon saying he would negotiate simply by saying, "no, no." Burgoon admitted telling employees that if there were negotiations, Respondent would begin with a clean sheet of paper, but denies the other statements reported by Hinson and Hudson regarding negotiations and/or the reduction of wages.

As between Hinson and Hudson on the one hand, and Burgoon and Ford on the other, I have absolutely no hesitation crediting Hinson and Hudson. The demeanor of both Burgoon and Ford in particular left much to be desired, and both impressed me as being rehearsed to support the other.

Respondent offered, and I admitted over objection from both counsel for the General Counsel and counsel for the

Union, an audio tape recording of what Burgoon said was a captive audience meeting he allegedly held with employees on February 9, 1994. The tape was offered, and specifically received by me, simply for the stated purpose of allowing the parties to evaluate for themselves the purported contents of at least one of Burgoon's meetings with employees. Now in its posttrial brief, counsel for Respond argues for the first time that since the February 9 meeting was the first captive audience meeting with employees, it is the one at which unlawful speech allegedly occurred, and on the basis of that tape, I should conclude that nothing unlawful took place. I reject that argument for numerous reasons.

To even make this argument now suggests that Respondent was engaged in trickery when it offered the tape. I admitted the tape for the stated purpose of it being merely an example of a single meeting precisely because Respondent made no claim that it was the actual meeting testified to by Hinson and Hudson. I would never have admitted the tape for that purpose because Respondent offered only the barest foundation for its admission. Had there been any suggestion that Respondent was offering the tape to rebut Hinson and/or Hudson, I would never have admitted the tape without Respondent laying a proper foundation, including evidence concerning the recording device, the operator of the device, the authenticity of the recording, and custody and preservation of the recording. In short, I would not have admitted the tape based on a lack of foundation had Respondent shown even the slightest inkling that it was being offered to rebut the testimony of Hinson and/or Hudson. For example, Burgoon testified that the tape was a tape of the February 9 meeting, but Burgoon did not even make the tape. Burgoon testified that he had Darrick Moss make the tape. Even though Moss testified, he was never asked to identify or authenticate the tape that Burgoon testified Moss made. The tape which I received was offered by Respondent, and received by me, specifically as simply an

example of a meeting. It in no way stands to rebut the credible testimony of Hinson and Hudson.

Last, but not least, even the tape as admitted does not serve to rebut Hinson and Hudson because of the numerous gaps in the tape, and in Respondent's own transcript of the tape, where the tape is altogether unintelligible. Literally anything might be contained in those unintelligible portions of the tape.

Hinson and Hudson also testified credibly concerning a second meeting which Burgoon and Ford held with employees on or about March 9. Hinson testified that at the beginning of this second meeting, Burgoon asked employees to tell him why they wanted a union to organize his plant at that time. A discussion ensued concerning the fact that employees wanted better benefits. An employee asked if wages would increase with a union representing them. Ford replied that if employees selected a union to represent them, Respondent would negotiate with the Union, and then asked the rhetorical question, "How much lower do you want them to go?" Ford denies stating that wages would go down, but admits he told employees that negotiations would "start from scratch." Burgoon likewise admitted that he told employees, "We'd negotiate with a clean sheet of paper."

Hinson testified credibly that Burgoon then resumed asking employees why they wanted a union. In response to various employee comments, Burgoon stated that he would look into a 401(k) plan for employees, and he would rent a tent for smokers and put it up out back for them.

Hudson testified very similarly to Hinson. Hudson recalled Ford saying, "So you want a union. Let's negotiate pay. How much do you want it cut?" Hudson acknowledged that at some point Ford stated that pay could increase or decrease. Hudson testified credibly that Burgoon also interrupted Ford, stating, "Here's my negotiations,

no, no, hell no." Hudson also recalled that after asking employees why they wanted a union, and one employee mentioning raises, Burgoon offered an employee a brake shoe in lieu of a raise. The employee complained about the flippancy of Burgoon's remark. Burgoon then said that he did not mean the remark "that way" and that he would try to work things out.

C. *Early April 1994: Conversations Between Management and Employees*

Susan Hudson testified credibly that in early April 1994, she was called by Supervisor Bill McBride to the training room, where the two of them met privately. McBride asked Hudson why employees were so unhappy, why they wanted a union, and specifically, why she wanted a union. Prior to this meeting, Hudson had not told anyone that she supported the Union, but she handed out union literature to other employees.

Hudson told McBride that the only reason he was asking her those questions was because Burgoon had asked him to do so. McBride denied this, telling Hudson that Burgoon was unaware of their conversation. Hudson told McBride that people were treated poorly, especially by Burgoon. McBride said that Burgoon did not realize how badly he treated his employees. McBride told Hudson that he had almost resigned because Ford and Burgoon had treated him in a similar fashion. Hudson then detailed a number of employee concerns about working conditions. McBride assured Hudson that he "was there to help make changes."

McBride did not deny this conversation with Hudson. When asked whether he had any conversation with Hudson in which he "attempted to tell her that you were going to take care of any problems that she had," McBride answered, "As I have with every other employee on first shift." I credit Hudson entirely.

Martha Hinson testified credibly that on or about April 7, McBride approached her while she was working in the warehouse. Hinson and fellow employee Rocky Holloway were working in the warehouse with a ladder, and neither of them were wearing safety glasses, a fact which becomes significant later. Hinson testified credibly that McBride was holding a union flyer in hand and, as he approached, asked angrily, "I thought this stuff done stopped. What is this mess still going on?" Hinson answered the obvious, that it was a union flyer. McBride asked why the Union was still trying to organize. Hinson replied that Respondent needed to make some changes. McBride then encouraged Hinson to speak freely and promised that their conversation would be "off record." McBride asked why so many employees were unhappy with working conditions. Among other things, Hinson expressed some safety concerns. McBride told Hinson that Respondent was planning to start a safety committee in the immediate future and that its first meeting would be the next week. Hinson, who had been told that the committee was for team leaders only, complained that no employees were involved. McBride then responded that he was appointing Hinson to the committee. McBride's denial of this conversation, including his denial that he ever held any "off-the-record" conversation with an employee because he did not know how a conversation could be "off-the-record," was less than convincing. I find that the conversation occurred as described by Hinson.

Hinson also testified credibly about a meeting held by Supervisor Steve Keegan and team leader Belinda Dailey on April 17 with various employees, including Hinson and employee Rocky Holloway in Keegan's office. Keegan told Hinson and Holloway that he wanted to know what made them happy and what made them unhappy concerning their jobs and working conditions. Keegan said he wanted to know how he could make their jobs better. Hinson replied that Dailey had problems communicating with

employees, a problem Dailey acknowledged. Hinson told Keegan and Dailey other problems which had caused employees to want a union. Respondent did not call either Keegan or Dailey as witnesses, and Hinson's credible testimony stands totally unrebutted.

Later that same day, employee Holloway and team leader Dailey had a confrontation. Hinson, who witnessed the confrontation, remarked to Holloway that things would be different after the Union became their bargaining representative. Dailey, overhearing Hinson's remark, returned and said angrily, "Union. That's all I've heard is union, union, union. I am so sick of union, union, union. There's no union coming in here."

D. *April 19, 1994: The New Discipline System*

The complaint alleges, and counsel for the General Counsel contends, that on April 19, 1994, Respondent instituted a new and stricter disciplinary procedure in response to employees' union activities. During the investigation of this case by the Board's Regional Office, Assistant Production Manager Ford admitted that Respondent instituted a new disciplinary system on April 19. At the trial herein, however, Respondent asserted that in fact it changed the disciplinary system in November 1993, prior to the advent of union activity, and that Ford's affidavit was simply "an error."

As is often the case, it helps to understand what is not in dispute, as well as what is. What is not in dispute is that at some point Respondent instituted a new and stricter disciplinary system. Under both systems, various rule infractions are considered either "minor" or "major." Under the "old system," supervisors used their discretion to classify infractions as "minor" or "major." Three minor violations within a 30-day period equaled one major violation. Two major violations within a 30-day period resulted in a 3-day suspension without pay. Three major violations

within a 30-day period resulted in discharge. Under the "new system," three minor violations within a 30-day period still equals one major violation. Two major violations, however, within a 90-day period results in demotion of one pay level or, if demotion is impossible, then dismissal. Further, three major violations within 6 months also results in demotion or, if not possible, dismissal. This stricter system resulted in more discharges, including numerous union supporters. As noted, Respondent now argues that it instituted the new system in November 1993, prior to any union activity, in conjunction with a change in pay scales and the method for employees receiving raises by going from one pay scale to the next.

Just as there is no dispute that at some point in time Respondent instituted this new and stricter disciplinary system, likewise there is no dispute that it was in November 1993, Respondent revised its pay scales and method for progression. The dispute, at least as defined at the trial stage herein, is whether Respondent instituted the new disciplinary system in November 1993, as it now contends, or whether it introduced that system in April 1994, in response to employees' union activities. For reasons fully described below, I find that the evidence shows the new disciplinary system was instituted in April 1994.

During the investigation of these unfair labor practice charges by the Board's Regional Office, Assistant Production Manager Mike Ford, who is second only to Burgoon in Respondent's chain of command, stated in a sworn affidavit that Respondent instituted this new system on April 19, 1994. This was not an affidavit taken by an investigating Board agent who might have misunderstood, misinterpreted, or perhaps even arguably misquoted Ford. This was an affidavit prepared by and submitted through Respondent's own counsel to the Board as a part of Respondent's position statement. Nor did Ford say in this affidavit only once or in passing that Respondent introduced this system on April 19. Rather, in this affidavit

Ford stated uncategorically over and over that Respondent revised its disciplinary system on April 19, and offered a lengthy justification for doing so at that time. Respondent's counsel even sent a position letter to the Board's Regional Officer wherein he confirmed the same date.

At the trial herein, Ford testified that the new disciplinary system was instituted in November 1993, and that his affidavit to the contrary was simply in error. Ford asserted that Respondent experienced problems with the old system being ineffective because employees viewed the 3-day suspension as "sort of a vacation." Ford admitted that part of the purpose for changing the system was to discharge more employees. As Respondent's counsel paraphrased Ford's testimony in his posttrial brief, "Given the high number of violations required in a relatively short period of time before an employee could be terminated, PFC had been unable to eliminate poorly performing employees from the work force."

Ford testified that beginning in late summer 1993, a group of management employees, supervisors, and hourly employees began meeting to consider revising Respondent's pay structure. As a result of these meetings, in November 1993, Respondent instituted a new pay system with various pay levels whereby an employee could advance from one to the next by taking and passing certain tests. There is no dispute about this limited aspect of Ford's testimony.

Ford also claimed, however, that it was in conjunction with these changes in the pay scales that Respondent changed its disciplinary system. Tom Davis, Respondent's controller, claimed to be able to pin down the precise date of the change in the disciplinary system by referring to payroll records which showed that the change in pay scales occurred on November 15, 1993. Davis' assertion, however, is circuitous and begs the question since there is no dispute that pay scales were changed at that time. The

fact that Respondent held meetings with employees to explain the new pay scales is similarly of no help. Employee witnesses testified credibly that while such meetings were certainly held to discuss the new pay system, there was absolutely no discussion and no change in the disciplinary system at that time.

Both Ford and Burgoon testified under oath that they attended numerous meetings with supervisors and hourly employees which resulted in the changes in Respondent's pay system and, they alleged, its disciplinary system. Both Ford and Burgoon claimed repeatedly that notes were kept of these meetings. Ford, for example, claimed that he attended 15 to 20 such committee meetings prior to November 1993, at which he took notes, during which the new disciplinary system was devised. Ford testified also that he spoke to employees on 15 to 20 other occasions about the new disciplinary procedure. Ford even claimed that prior to giving his June 1994 affidavit through counsel, he reviewed a file which contained notes of the aforementioned meetings. Ford claimed that he simply erred in giving his affidavit. Burgoon and Controller Davis similarly testified that they attended such committee meetings at which notes were kept. In spite of all this testimony Respondents did not offer one single note from any of these meetings to prove that a new disciplinary system was ever discussed during that time frame. Nor did Respondent offer a single hourly employee witness, a group of whom allegedly attended these committee meetings, to testify that a new disciplinary system was ever discussed, even though Burgoon tesetified that the employees who served on that committee were still employed by Respondent. I draw the adverse inference that if such notes or employee witnesses had been produced they would not support Respondent's position.

Assistant Production Manager Ford and Controller Davis testified that in November 1993, Respondent posted two documents which were introduced as exhibits herein,[2]

[2] R. Exhs. 1 and 7.

which show that Respondent changed not only job rates but the disciplinary system. One of these documents, Respondent Exhibit 1, purports to be an actual copy of a notice posted by Respondent on bulletin boards in and about its facility in November 1993. The other, Respondent Exhibit 7, is the document which Controller Davis testified was prepared to inform employees of the job rate changes. Upon further inspection it quickly becomes obvious that the second of these documents has no substantive weight whatever in deciding when the new discipline system was imposed. Davis testified that what was posted was posted on November 1, yet when Davis was shown that Respondent Exhibit 7 contains entries for employees hired after November 1, Davis simply declared that the exhibit was a document updated from the original. Davis testified that Respondent Exhibit 7 was "not [posted] exactly in this format . . . but, this sheet here was prepared from the same computer spread sheet as what was posted." One must ask, if Respondent did prepare a document to inform each employee on the payroll prior to November 1 what changes there would be in their wage rates as a result of the new pay scales, why would Respondent ever have reason to update such a document to include employees hired after that date. Respondent Exhibit 7 contains the names of at least 21 employees whose hired date is listed as occurring after November 1, 1993. It is highly unlikely, therefore, that Respondent Exhibit 7 was ever posted on or near November 1. Even if it was, however, Respondent Exhibit 7 simply shows the names of the employees and their hourly wage rate. It does not contain anything on its face which makes any reference to a new disciplinary system, and therefore I find it to be of no help in resolving the issue.

The other document, Respondent Exhibit 1, which Respondent claims was posted on or about November 1, 1993, is in reality the lone document which Respondent offers as evidence that employees were notified of a new

disciplinary system in November 1993. A careful analysis of this document gives me good reason to believe it should be viewed very suspiciously. The document itself is not dated, and no one testified to creating the document. An employee witness, Merri Rowe, testified credibly that she had never seen that document before, but rather she had seen another document posted in November 1993, which showed only the upper portion of Respondent Exhibit 1, in enlarged type, without the lower one-third of the document being a part of the original. Even without Rowe's testimony, careful scrutiny of Respondent Exhibit 1 raises more questions than it answers.

At the top, the document contains a section with the heading "Pay Levels" and then lists seven specific pay levels and their base rate. Below that, it contains a second section captioned "Definition Of Levels." Although there are seven pay levels enumerated in the first section, only four pay levels are described in any detail in the second portion. Further scrutiny reflects that the document, as presented, appears to have been altered in some way so that it now reads in a reverse format. Nearest the top of the second section is an entry which reads "Level 4 includes:" after which 10 skills or apparent qualifications are listed. Then below that, not above it as would be normal, is an entry which reads, "Includes all items in level 3 and the following:" Immediately below that is the entry which reads "Level 3 includes" and lists skills or qualifications for level 3. In other words, as presented, this middle section of the document makes sense only if read from the bottom up, rather than from the top down as is normal, and as is true with the rest of the document. The critical language which Respondent now relies on is contained in a third section of the document near the bottom. This third section contains 11 specific items which are now enumerated, however, and are preceded merely by asterisks. Unlike the top two portions, which contain specific captions, the bottom third section of the document

contains no caption or heading. Thus, this third and very important section is presented in a format altogether different from the rest of the document.

Given the format in which it exists, I simply cannot believe that the document was ever intended for publication to employees or ever used to be posted to notify them of either new pay levels or new discipline. Not only does a major part of this document read backwards, from bottom to top, it describes skills and qualifications for only four of the enumerated seven pay levels. If this were posted in the format in which it now appears for general employee consumption, at the very least it would almost certainly lead employees to conclude that as a practical matter they should not expect to rise above level 4. In the final analysis, in the format in which it now appears this document simply makes no sense. I cannot help but wonder if in preparation for this trial someone did not borrow portions of some other document or documents which they somehow managed to rearrange in such a hurry that it now has a completely nonsensical format.

My suspicions about Respondent Exhibit 1 are by no means the only reason, or even the primary reason, why I conclude that the new disciplinary system was instituted in April 1994, and not in November 1993. It is simply one of many factors, as is the adverse inference drawn by Respondent failing to provide purportedly existing notes of meetings which might support Respondent's position. Yet another factor is a careful scrutiny of Ford's testimony. Ford testified not only that the new disciplinary system was installed in November 1993, he also testified as follows:

> When we changed the disciplinary system in November of '93, we updated the packets that we gave out to all the new hires that had our new policy in it, our policy on both disciplinary and wages, so the information that the employees were given was the

> new information that was revised in November of '93 . . . .

The Respondent, however, never produced any such "up-dated packets" given to new hires between November 1993 and April 1994. In fact, from documents produced pursuant to counsel for the General Counsel's subpoena and introduced as exhibits by him, Ford's testimony was shown to be utterly false, and in fact employees hired between November 1993 and April 1994 were simply given the 1993 handbook which describes the "old system" of discipline. Employees hired between November 1993 and April 1994, were even required to sign a document encoded with the date "9/22/93," which makes reference to the old disciplinary system.

What is more, the disciplinary documents themselves issued between November 1993 and April 1994 show that during that period, supervisors were continuing to mete out discipline pursuant to the old system. No fewer than 11 instances of discipline were issued during that period not only on forms used under the old system, but clearly utilizing rules of the old system. The old forms allowed supervisors discretion in categorizing offenses as major or minor. In contrast, all disciplinary forms in evidence dated after April 20, 1994, are on new forms which rigidly and inflexibly set out violations by category and severity. The evidence, including numerous disciplinary reports in Respondent's own records, shows that the old disciplinary system was very much in use until at least mid-April 1994. I conclude that Respondent's new disciplinary system was put into effect on or about April 19, 1994, exactly as Ford testified in his June 1994 affidavit.

E. *Discharges Pursuant to the New Disciplinary System*

April 20: Discharge of Martha Hinson

Martha Hinson began working for Respondent in January 1994.[3] Hinson worked on first shift in packing, shipping, and receiving.

Hinson was one of the most active union supporters. Assistant Production Manager Ford admitted he was aware of Hinson's union sentiments and was disturbed by her distributing union handbills. As previously discussed, Supervisor McBride approached Hinson with a union flyer and asked Hinson angrily what it was. Hinson stood up for the Union to McBride. On April 19, Hinson's team leader, Dailey, heard Hinson mention the Union, became angry, and said there would be no Union coming in to represent Respondent's employees. On that same day, Respondent instituted its new disciplinary system. The very next day, Hinson was discharged pursuant to that new system. As Respondent states in its posttrial brief, Hinson was "terminated for committing three major violations in 6 months," a standard imposed by the new system.

During the morning of April 20, Supervisor Steve Keegan and team leader Belinda Dailey, neither of whom testified, met with Hinson and Rocky Holloway. Keegan issued Hinson and Holloway major violations because certain parts had been mislabeled and shipped to an incorrect address. Hinson protested the discipline because she had merely selected parts for shipment, and had not even handled the shipping label. Keegan told Hinson, however, that she was responsible because she was a member of the team that mis-shipped the parcel. Hinson asked if team leader Dailey would also be punished since she too was a member of the team. To this Keegan replied no, that Dailey "didn't have nothing to do with these

[3] Due to Respondent's high turnover, few employees have any significant tenure.

here parts." Holloway resigned rather than accept a pay cut under the new disciplinary rules. Walker asked Hinson if she also intended to quit. Hinson refused to quit.

Later that day, Assistant Production Manager Ford summoned Hinson to meet with him and Supervisor Keegan. Ford began the conversation by focusing on the previously described shipping error. Hinson asked Ford if he intended to issue her two warnings for the same incident. Ford then said that he was issuing a second warning to Hinson for failing to wear safety glasses. Ford said he had seen Hinson 2 days before that entering the plant from the warehouse with her safety glasses propped on top of her head, and that she brought the glasses down to her face while Ford was looking at her. Ford replied that he had been too busy. Ford then discharged Hinson for having two major violations within 90 days.

Several witnesses testified that it was common practice not to wear safety glasses in the warehouse, and the record establishes that wearing safety glasses in the warehouse was not strictly enforced. Hinson testified credibly that Ford himself wore no safety glasses when he conducted captive audience meetings in the warehouse. Further, Burgoon himself had seen Hinson not wearing safety glasses in the warehouse and has not written her up. Respondent's witness Walker first testified that the rule requiring wearing of safety glasses referred just to the plant floor, not the warehouse. On redirect, however, Walker changed course and agreed with Respondent's counsel that the warehouse was part of the plant.

April 27: Discharge of Merri Rowe

Merri Rowe began working for Respondent on September 21, 1993. Rowe became an active union supporter from the very beginning of the campaign by collecting names of interested employees to pass on to the union organizer.

On April 21, Supervisors Ed Brewer and Jimmy Walker held a meeting with six employees, including Rowe and Haywood Steel. Brewer and Walker began the meeting by first discussing safety and job related issues. After discussing these issues, Walker asked Rowe directly why the Union was trying to organize Respondent. Rowe responded in detail regarding what she considered to be employee concerns, including holiday pay, vacation schedules, and the testing program whereby employees could move from one pay scale to the next. Rowe said that it was hard for her as a third-shift employee to take the pay raise test which was given only during first shift. Walker responded that as of that day, Rowe could take the test for the next pay level during her own work shift. Steel testified credibly that Walker then asked the group in general, "What can we do to make your jobs run better? If you have any gripes you can bring it out now." Steel testified credibly that prior to this meeting, no one from management had ever solicited his or other employees' concerns, nor ever promised to remedy any problems.

On April 27, Rowe was discharged pursuant to Respondent's new disciplinary system. During February 1994, Respondent had issued a major violation to Rowe for passing defective work on to the next process. On March 8, Rowe received a major violation for not wearing her safety glasses while on the plant floor.

On April 26, Rowe telephoned the plant and informed her supervisor that she could not come to work because her estranged husband had suddenly refused to care for their children and she was unable to secure a babysitter so late at night and on such short notice.

On the next day, April 27, Respondent issued Rowe a major violation for the previous days' unexcused absence. Rowe was then discharged for accumulating three major violations within 6 months.

The record reflects that at least two other employees who had unexcused absences within a week of Rowe's were not written up and thus not terminated. Rowe's own supervisor admitted that he had given other employees excused absences for reasons not specified on the form.

F. *April 28: The Truck Incident*

On April 28, 1994, union organizer Janice Landis, employee Susan Hudson, and recently discharged employee Martha Hinson were distributing union literature outside Respondent's facility prior to the beginning of first shift. After some time, Hudson left to report for work on first shift. At one point, while Landis and Hinson were sitting in Landis' car parked on the side of the road, a policeman came out of Respondent's plant and stopped near Landis' car. The policeman explained that Respondent had called to complain about their leafleting activities. Burgoon admitted that he had called the police. The policeman told Landis and Hinson that they were not doing anything wrong and that they could continue to stay there, just so long as they did not go on plant property. The policeman left. Landis and Hinson then resumed positions standing on Carbon Metallic Road, which leads away from Respondent's plant, about 25 feet from the intersection where it meets a stop sign at Highway 55. Landis and Hinson stood in the middle of the road in order to pass out handbills to employees coming in to the first shift as well as employees leaving from the third shift who had to stop at the stop sign.

Employee Haywood Steel left the plant from third shift, stopped and accepted literature from Landis and Hinson, and drove off. Immediately after Steel drove off, a truck being driven by Burgoon approached Landis and Hudson, then swerved toward them, and slammed on its brakes. Landis, Hinson, and Steel, who witnessed the incident in the rear-view mirror of his vehicle, all testified that the truck stopped so abruptly there was much screeching of

tires, and even some smoke. Although Burgoon denies there was smoke, even Burgoon admits that he left tire marks in the road. The truck came to a halt just short of where Landis and Hinson were standing. Burgoon then continued on to the stop sign, abruptly made a U-turn, and returned to where the women had been standing.

Steel also turned around and returned to where the women had been standing to see if they were all right. Steel noticed Burgoon driving the truck, and Mike Ford was in the passenger's seat. Burgoon asked Landis and Hinson, "What the hell do you think you're doing?" Burgoon claimed that Landis called him a "mother fucker." Landis denied using that expression, and although he was the passenger in the truck, Mike Ford did not testify regarding this incident. In view of Burgoon's conduct, it would certainly not be surprising if Landis cursed Burgoon, particularly in view of both Landis' and Hinson's credible testimony that Burgoon's truck would have hit them had they not jumped out of the way to the side of the road. Landis told Burgoon that he knew she had a right to be there distributing literature. Burgoon responded that Landis' car was illegally parked, drove up behind it, and tried to telephone police from his car phone. When Burgoon was unable to reach the police, Burgoon telephoned the plant and told them to call the police. Burgoon then left.

After the incident, Landis, Hinson, and Steel all went to the local police station where Landis swore out a warrant against Burgoon. Steel testified that he witnessed a police report which charged that Burgoon had intentionally driven toward Landis and Hinson. At the time of the trial herein, this police matter had not yet come to trial.

G. *Other Discharges Pursuant to the New Disciplinary System May 6: Discharge of Haywood Steel*

Haywood Steel began working for Respondent on November 22, 1993. Steel was employed on the third shift as a mold line press operator.

In March 1994, Steel attended an employee meeting during which Third-Shift Supervisor Ed Brewer showed employees an antiunion film. Steel testified credibly that during this meeting, he asked Brewer why he was only showing the negative side of unions. Steel stated that he had worked for a unionized company for 9 years, and that the union had helped him.

During April 1994, Steel became active in the union organizing drive at Respondent's facility. Steel passed out union flyers and collected employee signatures on a union petition during his breaktime at the plant.

On April 18, Steel received a major violation for failure to properly complete quality control paperwork.

On April 28, Steel witnessed Burgoon's narrow miss of Landis and Hinson as they were standing in the road handing out union literature. Steel gave a statement to the police concerning the incident.

On May 5, Steel was given a second major violation, again for failing to properly fill out quality control paperwork. According to Supervisor Walker, Steel had written down the wrong code numbers on a first-piece inspection. Walker, however, refused to show Steel his mistakes as he had done in the past, and instead, wrote over what Steel and his partner had done. As a result of being given this second major violation, Steel was discharged pursuant to Respondent's new disciplinary system for having received two major violations in a 90-day period.

May 27: Discharge of Susan Hudson

Susan Hudson began working for Respondent on August 9, 1993. From August 1993 until April 28, 1994, Hudson worked in Respondent's shipping department on the first shift. During that time, Hudson became known as a very good employee. She received no discipline whatever and several "Attaboys," a form of reward which can be accumulated to equal a cash bonus.

Hudson also became one of the most active union supporters. Burgoon, Ford, and McBride all admitted they knew Hudson was an active union supporter. In fact, on the morning fo April 28, just prior to the incident in which Burgoon and Ford narrowly missed Landis and Hinson as they were distributing union literature on the roadway outside of Respondent's plant, Hudson had been out there too with Landis and Hinson distributing union flyers. Hudson had left just prior to the incident in order to report for work on the first shift.

On the very same morning as Burgoon and Ford's narrow miss of Landis and Hinson, in fact at almost the very same time, Respondent transferred Susan Hudson from her job in the packing department to the mold line. Respondent transferred Hudson and three other employees to the mold department allegedly to help relieve a "bottleneck situation."

Hudson testified credibly that when she was transferred to the mold line, she was inadequately trained, given poor machinery to work with, and frequently transferred from press to press. In his testimony, McBride testified that employee Larry Wright was trained on the mold line for a "couple of weeks" before being turned loose on his own, and this was considered rapid advancement. McBride further admitted that a new mold operator would need to be trained on more than just quality in order to function properly on the mold line. Be that as it may, McBride admits Hudson's testimony that she was trained

for only 3 days before being assigned to operate a press by herself. McBride also admitted that the press to which Hudson was assigned was often broken, and in fact was even broken on the day Hudson was discharged as described later. Finally, McBride admitted that in her short time on the mold line, Hudson operated at least five different presses. Nevertheless, even under these adverse circumstances, Hudson earned several "Attaboys" for exceptional performance while on the mold line.

On May 6, less than 2 weeks after being transferred to the department, Hudson and fellow employee John Colvin were working on a press making experimental brake prototypes. Hudson discovered that she and Colvin had made a defective pad, which Hudson described as being "taller" than other pads, and Hudson brought this to the attention of team leader Earnest Miller. Hudson testified credibly that a short while later, McBride approached and told Hudson, "You have a good eye. That's why we wanted you on the mold line." Hudson asked McBride to give her an "Attaboy" commendation, and McBride agreed to do so. McBride claimed in his testimony that he was only being sarcastic, and that Hudson should have known this.

Later that day, team leader Miller told Hudson that he would be issuing discipline to her for making the pad which Hudson had called to his attention. Hudson asked Miller why she would be getting discipline for something which McBride had earlier commended. Miller told Hudson that he did not know, and invited Hudson to talk to Mike Ford. Miller, Hudson, and Colvin then met with Ford. Hudson told Ford that she believed the discipline to be unfair. Nevertheless, both Hudson and Colvin were given a major violation for making this defective part.

On May 17, McBride issued Hudson a second major violation for failing to indicate on the "work in progress ticket" the next process to which certain parts were to be sent. Hudson admitted making this error.

On May 24, McBride placed a third "major violation" in Hudson's personnel file for an incorrect first-piece inspection and for failing to properly fill out quality control paperwork. McBride testified that he found mistakes on Hudson's first-piece inspection report following her shift on May 24. There is no indication on this discipline that it was ever shown to Hudson. She did not sign for its receipt, and there is no indication on the form that she refused to do so, as there were on other such forms.

On May 27, Hudson received another major violation which resulted in her dismissal in accordance with Respondent's new disciplinary system. On that day, Respondent summoned Hudson to the personnel office where McBride met Hudson and told her that she was being disciplined and discharged for passing bad parts on to the next operator. Hudson denied doing so. Hudson told McBride that they both knew the press she was working on was defective and had been consistently producing bad parts. Hudson stated that they both knew that, but that she had not passed on bad parts to the next process. McBride disagreed, issued the major violation to Hudson, and Hudson was discharged.

According to McBride, following McBride's meeting with Hudson, McBride reinspected the defective parts. He concluded that in order for so many defective parts to have been passed on, Hudson must have acted intentionally. Even though she had already been discharged, McBride then wrote up an additional employee action report dated May 27, for making scrap unnecessarily and for intentionally passing defective work to the next process.

Throughout Respondent's case, it emphasized repeatedly its demand for a quality product and its incredibly high employee turnover of almost its entire workforce annually. McBride acknowledged that Hudson had been an exemplary employee in the shipping department, indeed, "a master packer, and a quality inspector over in packaging." McBride asserted that this was the very reason

why Respondent transferred Hudson on April 28. McBride acknowledged that outstanding employees are hard to come by and are a valued asset. Consequently, I asked McBride to explain why Respondent did not transfer Hudson back to packing if it detected that she was not working well as a mold operator. McBride, clearly uncomfortable with this question, at first attempted to avoid answering. McBride made no assertion that Respondent has any policy or practice against taking such action. I therefore prodded McBride for an answer, who finally responded simply, "Sir. I can't answer that."

May 30: Discharge of Manuel Motecon

Manuel Montecon began working for Respondent in August 1992. At the time he was hired, Montecon informed Respondent that he could only work third shift because he had to drive his children to different shools each morning. From August 1992 until February 1994, Montecon worked the entire time as a "wobble riveter operator." During his employment, Montecon received only one instance of discipline, in February 1993, more than a year prior to his termination.

At the beginning of the union campaign during February 1994, Montecon began to canvass third-shift employees regarding their interest in having the Union represent them. While Montecon had not attended any union meetings by the time he was injured on the job as more fully discussed below, Montecon did actively solicit names and addresses of interested employees to pass on to union organizer Janice Landis. Montecon testified credibly that during February 1994, team leader Jamie approached him while at work and initiated a discussion about the Union. Jamie, who worked under the direction of Supervisor Jimmy Walker, was Montecon's team leader. Jamie told Montecon that he had heard about the union activity anong employees and wanted Montecon to fill him in. Montecon did so. Burgoon himself identified Montecon

as one of the people whose names he had heard were engaged in union activity.

I do not credit Assistant Production Manager Ford's claim that he was unaware of Montecon's support of the Union when Montecon was discharged in May 1994. Ford's credibility is suspect on many levels for reasons discussed throughout this decision, and this is but one example. It is simply outrageous for Ford to claim he was not aware of Montecon's reputation for being involved in union activity when Corporate President Burgoon himself named Montecon as one of those who he had heard were among the primary union activists.

On the evening of February 28, not long after Montecon was interrogated about the Union by team leader Jamie, Supervisor Walker transferred Montecon from the riveter to the powder coater machine. Montecon protested the transfer, pointing out to Walker that he could not possibly work at the powder coater machine removing parts from the moving conveyor belt because he is simply too short at 5 feet 3 inches to reach parts moving along the backside of the conveyor belt. Walker, however, refused to relent.

On the very first evening at the powder coater machine, Montecon was injured by the conveyor belt system as he was stretching to reach some parts. While the injury seemed slight at first, the following morning Montecon's finger was swollen and throbbing. During the day, Montecon attempted to telephone Respondent with no success. That evening, Montecon telephoned Supervisor Walker who told Montecon to see a doctor, which Montecon did on March 3. Dr. Michael Heinig diagnosed Montecon as having a tendon separated from the bone. Heinig advised Montecon to remain off work for at least 1 week. Heinig placed a splint on the finger and advised Montecon to return to him on March 8. On the way home from the doctor's appointment on March 3, Montecon stopped at

Respondent's facility and delivered Heinig's note to Supervisor Walker.

On March 8, Montecon returned to see Dr. Heinig. Heinig wrote a note allowing Montecon to return to work on March 10, "light duty using right hand only next 8 weeks." On March 10, Montecon brought the note to Supervisor Walker ready to report for work. Walker, however, told Montecon that there was no light duty work and that Montecon should stay off work until he was fully released by his doctor. Montecon protested, pointing out that other employees were assigned to light duty work in the past. Walker insisted that Montecon not return until he could work without restrictions.

Montecon's convalescence took longer than Dr. Heinig first predicted. On May 3, Montecon had an appointment with Heinig during which Heinig extended his convalescence until at least May 18, a date at which Heinig set a future appointment for Montecon. Heinig gave Montecon a written excuse to remain off work from May 3 until May 18. When Montecon left Heinig's office, he drove directly to Respondent's plant, where he went to the personnel office and asked to see Personnel Manager Tom Davis. Unable to meet personally with Davis, Montecon left a copy of the written excuse from work with the receptionist, who said she would give it to Davis.

Because of a death in the family out of town, Montecon rescheduled his May 18 appointment with Dr. Heinig to May 24. At that appointment, Heinig released Montecon and gave him a slip stating that he was able to return to work "full duty." As before, Montecon immediately took the note to Respondent's plant. On this occasion Montecon met with Davis. Davis noticed that Heinig's release was technically incomplete in that Heinig had failed to check a box before the phrase "Return to Full Duty." Davis instructed Montecon to return to Heinig and have Heinig check the box authorizing a return to full duty. As Motecon was ill, he went home, telephoned the doctor's

office and received permission from the nurse to check the box. Montecon telephoned Supervisor Walker about returning to work. Walker informed Monteon that the plant was closed for Memorial Day and instructed Montecon that he should return to work on May 30 with the doctor's note.

As instruted by Walker, Montecon returned ready to work on May 30. Monteon met with supervisors Walker and Ed Brewer. Brewer told Montecon that Heinig's note was irrelevant because Montecon had already been terminated on May 7. Montecon protested, saying that he had been recuperating from a work-related injury. Brewer responded that Montecon was trespassing and that he should leave immediately, which Montecon then did.

Analysis and Conclusions

The record shows that after Respondent learned of union activity among employees, it held several meetings with employees where Burgoon and Ford attempted to "nip" that activity "in the bud." Martha Hinson, Susan Hudson, and Heywood Steel all testified credibly concerning various statements made by Burgoon and Ford at those meetings. I have no trouble crediting their testimony over Burgoon and Ford. Be that as it may, I do not credit Hinson that Burgoon stated he would do everything in his power, legally "*otherwise* to stop the Union. That specific statement is not corroborated by any other witness, including Hudson or Steel. Similarly, I find it impossible to rely on Hinson's sole testimony that Burgoon made an outright threat of plant closure. Even though more than 100 employees were at the meeting where that statement was allegedly made, counsel for the General Counsel offered no corroboration of Hinson's testimony. Moreover, it would appear that Heywood Steel atually disagrees with Hinson on this limited point. Hinson was by no means incredible, and I simply find she was inaccurate in these limited particulars.

On the basis of Hinson's and Hudson's credited testimony, I find that in these meetings with employees, Burgoon and Ford both clearly expressed to employees that it would be futile for them to select a union to represent them. While Burgoon paid lip service to the fact that pay could go either up or down, Ford told employees, "We'll negotiate wages. How much do you want to lower them.? Yes, we'll negotiate. No, no, no." Similarly, Burgoon told employees, "Here's my negotiations. No, no, hell no." Even Burgoon admits telling employees that if there were negotiations, Respondent would begin with a "clean sheet of paper." Similarly, Ford admits he told employees that negotiations would "start from scratch." I find, however, in crediting Hinson and Hudson that Burgoon and Ford did far more than that, and clearly communicated to employees that Respondent would simply negotiate by saying "no, no" to any union proposals. Moreover, I find that Burgoon's and Ford's comments constituted an implied threat to reduce wages if employees selected the Union to represent them. In making this finding, I am fully mindful that Burgoon paid lip servie to the fact that wages "could go up or down" in negotiations. The statement, however, that Reespondent could lower wages, coupled with statements that Respondent "would start from scratch" and "would start with a clean sheet of paper," and then coupled with the statement that Respondent would simply bargain by saying "no, no" carries with it the implication that Respondent would reduce wages. I find that Respondent thereby violated Section 8(a)(1) of the Act.

At the same time, Burgoon and Ford interrogated employees generally about why they wanted a union, and followed that by various promises to employees to attempt to dissuade them from supporting a union. I credit Henson and Hudson that at an employe meeting on or about March 9, Burgoon asked employees directly to tell him why they wanted a union to organize his plant at that time. As will be discussed in greater detail below, this was simply

the first in what soon became a pattern of Respondent interrogating employees about their union sympathies, soliciting grievances from employees, and promising to remedy these grievances in order to dissuade employees from continuing such activities. I find that when a discussion ensued concerning the fact that employees wanted better benefits, Burgoon stated he would look into a 401(k) plan for employees and would erect a tent for smokers. Similarly, when Burgoon offered one employee a brake shoe in lieu of a raise and the employee complained about the flippancy of Burgoon's remark, Burgoon promised that he would try to work things out with employees. I find that Respondent threatened employees with the futility of having a union represent them, that Respondent systematically interrogated the entire group about why they wanted a union, and made various promises to employees to dissuade them from selecting a union, all in violation of Section 8(a)(1) of the Act.

Burgoon himself admitted trying to keep track of which employees supported the Union. Similarly, Ford admitted he heard numerous rumors about who was active on behalf of the Union, and that he consistently passed that information on to Burgoon. One of the earliest instances of what soon became a pattern of interrogation incurred with employee Manuel Montecon. Montecon testified credibly that in February 1994, before he had done anything to openly support the Union, he was approached by team leader Jamie who told Montecon he had heard about union activity among employees and wanted Montecon to fill him in. Montecon did so. Jamie worked under the direction of Supervisor Walker, who in turned reports to Assistant Production Manager Ford. Ford is second in command only to Burgoon. Burgoon himself identified Montecon as one of the people whose names he had heard were engaged in union activity.

Similarly, Susan Hudson, who had not told anyone she supported the Union but had simply handed out union literature to other employees, was called to a private meet-

ing by Supervisor Bill McBride. McBride asked Hudson why employees were so unhappy, why they wanted a union, and specifically, why she wanted a union. During the conversation about the way employees were spoken to and treated by Burgoon and Ford, McBride promised Hudson that he was "there to help make changes."

Similarly, employees Martha Hinson and Rocky Holloway were approached and interrogated by McBride. As they were working in the warehouse, McBride approached holding a union flyer in hand, and then asked angrily, "I thought this stuff done stopped. What is this mess still going on?" McBride then proceeded to ask Hinson why the Union was still trying to organize employees. McBride encouraged Hinson to speak freely and promised their conversation would be "off the record." When Hinson told McBride that Respondent needed to make some changes, and specifically expressed some safety concerns, McBride proceeded to promise Hinson that she should immediately be placed on a safety committee that was being formed.

Hinson and Holloway were also interrogated by Supervisor Steve Keegan and team leader Belinda Dailey in Keegan's office. Keegan told Henson and Holloway that he wanted to know what made them happy and what made them unhappy concerning their jobs and working conditions. Keegan said he wanted to know how he could make their jobs better. Hinson's credible testimony stands totally unrebutted that she then told Keegan and Dailey various problems which had caused employees to want a union.

Employees Merri Rowe and Haywood Steel were interrogated by Supervisors Walker and Brewer. On April 21, just 2 days after Respondent instituted the new discipline system, and the day after Respondent discharged Martha Hinson, Brewer and Walker held a meeting with six employees which they began by first discussing safety and job-related issues. After discussing these issues, Walker

asked Rowe directly why the Union was trying to organize Respondent. While Rowe was certainly an active union supporter by that time, there is no indication that Rowe had made that known to Respondent. In response to Walker's question, however, Rowe responded in detail regarding what she considered to be employee concerns, including holiday pay, vacation schedules, and the testing program whereby employees could move from one pay scale to the next. When Rowe explained that it was hard for a third-shift employee such as herself to take the pay raise test which was given only during first shift, Walker responded that as of that day Rowe would be able to take the test during her own work shift. Haywood Steel testified credibly in this same meeting. Walker then asked the group in general what Respondent could do to make their jobs better. Steel also testified credibly that prior to this meeting, no one from management had ever solicited his or other employees' concerns, nor had they ever promised to remedy any problem. Rowe and Steel were both discharged by Respondent a short time after this interrogation.

The Board has long held that whether interrogation is unlawful depends on surrounding circumstances, including the time, place, personnel involved, purpose, and information sought. Even the employer's known preference has been recognized as one consideration. See *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985); *Rossmore House,* 269 NLRB 1176 (1984); *Blue Flash Express,* 109 NLRB 591 (1954). I find the totality of circumstances shows each of these instances of interrogation to be unlawful. From the outset, Respondent had made it clear that it was absolutely opposed to its employees becoming organized. Burgoon and Ford were not just opposed to unionization, but violently opposed, as shown by the incident in the pickup truck when they swerved toward, and only narrowly missed, hitting Landis and Hinson as they distributed union flyers on the roadway outside of Respondent's property. None of these instances of

interrogation suggest that the cicumstances were casual or informal, that they all occurred at work, and in each instance it was a supervisor who initiated the conversation. The record here shows that once Respondent learned of union activity among employees, it began what eventually became a pattern of interrogating individual employees who it suspected of supporting the Union, both about their own individual union sympathies and those of employees generally. It did more than simply interrogate employees. In almost every instance it also went on to solicit grievances from those employees and then promised to remedy those grievances. Respondent's assertion that it ever maintained an active "open door policy" is simply without merit. The record shows that employees have been encouraged to make suggestions about improving the product itself, but there is no evidence such a policy ever existed to encourage employees to discuss complaints about working conditions. Indeed, as I have found above, Haywood Steel testified credibly that prior to the advent of union activity, no one from management ever solicited employees' concerns about working conditions, nor ever promised to remedy any problems.

Nor can I overlook the fact that shortly after each of these instances of interrogation, the employees interrogated who expressed sympathy for the Union were discharged. That fact is discussed in greater detail below. I find that Respondent unlawfully interrogated employees concerning their union activities and sympathies, and the union activities and sympathies of other employees, in violation of Section 8(a)(1) of the Act. I also find that in these same conversations Respondent unlawfully solicited grievances from employees and promised employees various improved benefits and working conditions in an attempt to dissuade them from supporting the Union, and Respondent thereby violated Section 8(a)(1) of the Act.

On April 19, 1994, Respondent instituted a new and stricter disciplinary system. This new system took away

the discretion of supervisors to categorize rule infractions as major or minor. Under the new system, two major violations within a 90-day period results in demotion of one pay level or, if demotion is impossible, then dismissal. Further, three major violations within 6 months also results in demotion or, if not possible, dismissal. Respondent admitted that part of the purpose for changing the system was to discharge more employees. As Respondent's counsel states in his posttrial brief, "Given the high number of violations required in a relatively short time before an employee could be terminated [under the old system], PFC had been unable to eliminate poorly performing employees from the work force." Respondent's desire to discharge more employees is somewhat remarkable in and of itself in view of the fact that Respondent already turned over almost its entire work force annually.

The timing of Respondent instituting this new discipline system is obviously critical, which is why Ford tried so hard to disavow his earlier sworn affidavit. For all the reasons already expressed above, however, the evidence shows that the new discipline system was instituted in April 1994, in response to employee union activity. Respondent instituted this system at a time when it was becoming more and more clear to Respondent as a result of the answers it was getting to its unlawful interrogation of employees, that there was indeed a significant prounion movement among the employees. It was no accident that the first people caught in the new policy's web were known union supporters. Martha Hinson, Merri Rowe, Haywood Steel, Susan Hudson, and Manuel Montecon were all discharged pursuant to the new system not long after being unlawfully interrogated by Respondent about their union activities and sentiments. Jerry Kennedy, another of the three union activists named by Burgoon, was also discharged just a day or two after the new system was instituted.

I find that Respondent violated Section 8(a)(1) and (3) of the Act by instituting this new disciplinary system

both to discourage union activity and to rid itself of union activists. *Joe's Plastics*, 287 NLRB 210 (1987); *Robinson Furniture*, 286 NLRB 1076 1987); *International Business Systems*, 247 NLRB 678 (1980), enfd. 659 F.2d 1068 (3d Cir. 1981), and cases cited therein. In *Joe's Plastics*, the Board went on to specifically state that having concluded the new disciplinary system was unlawful, the corresponding discipline meted out under that system was also unlawful. I find that such is the case here as well.

One of the primary arguments advanced by Respondent in support of its position regarding the institution of the new disciplinary system, as well as various individual discharges at issue here, is that Respondent applied the new disciplinary system equally against union supporters and other employees in a nondiscriminatory manner. The record is not as clear on this point as Respondent would have one believe. In fact, a review of various individual discharges reflects that Respondent went to considerable extremes to ensnare some of the union activists in this new disciplinary system. For example, Martha Hinson was issued a major violation on April 20 when certain parts were mislabeled and shipped to an incorrect address although Hinson had nothing whatever to do with preparing the shipping labels. Also on April 20, Assistant Production Manager Ford issued Hinson a second major violation by reaching back 2 days prior and issuing Hinson a warning for not wearing safety glasses in the warehouse. The record, however, clearly reflects that it was not common practice to wear safety glasses in the warehouse and that Respondent's own supervisors did not consider the warehouse to be covered by the rule.

Similarly, in order to support the discharge of Merri Rowe on April 27, Respondent issued Rowe a major violation for an unexcused absence the previous day even though Rowe's own supervisor admitted he had given other employees excused absences for reasons not specified on Respondent's forms and even though other employees had unexcused absences within a week of Rowe's

and were not even issued discipline. A similar example is shown in the case of Haywood Steel's discharge. When Steel was given a major violation on May 5 and discharged, Supervisor Walker refused to show Steel his mistakes as he had done in the past.

The discharge of Susan Hudson represents an extreme example of Respondent reaching out to ensnare a union supporter in its new disciplinary procedure. Respondent touted Hudson as a superlative employee in its shipping department, which it states was the very basis for Respondent transferring Hudson to another position on April 28, the very day when Burgoon and Ford narrowly missed hitting union organizer Landis and recently discharged employee Martha Hinson as they were distributing union literature outside Respondent's plant. Although Hudson was inadequately trained, frequently transferred, and given poor equipment, she nevertheless earned recognition for exceptional performance in the new position. Yet, on May 6, when Hudson caught her own work error and pointed it out to Respondent, Respondent seized on this as an opportunity to issue Hudson discipline pursuant to the new system. Other discipline was placed in Hudson's personnel file without even being shown to Hudson. Then, only 3 days later Respondent issued other discipline to Hudson for allegedly passing on bad parts even though this exemplary employee denied having done so. Respondent then discharged Hudson quite obviously without even considering transferring Hudson back to the shipping department where she had established herself as such an exemplary employee.

Last but not least, is the case of Manuel Montecon. Montecon is one of few employees who worked for Respondent more than 1 year. From the beginning of the union campaign in February 1994, Montecon actively solicited names and addresses of interested employees to pass on to the Union. Montecon was interrogated by his team leader about the union campaign, and Burgoon himself identified Montecon as one of the people whose

names he had heard were engaged in union activity. Not long after being interrogated about the union campaign, Montecon was transferred from the only position he had held while employed by Respondent to a position on the powder coater machine where it was extremely difficult for him to work due to his short stature.

On the very first evening at this new position, Montecon was injured. Though the injury would have allowed Montecon to perform light duty work, as other employees had in the past, Respondent refused to allow Montecon such duties, insisting that Montecon not return to work until he could work without restriction. Throughout the time Montecon was off work due to this injury, he faithfully kept Respondent informed about his condition. Each time he was given a new written status report by Dr. Heinig, Montecon immediately took a copy to Respondent. On May 24, when Montecon was finally released to return to work full duty, Montecon also took this note to Respondent. Personnel Manager Davis, however, refused to allow Montecon to return to work because a single box had not been checked by Dr. Heinig. A few days later, Montecon was instructed by Supervisor Walker to return to work on May 30, which he did. Then and only then was Montecon informed that he had already been terminated on May 7.

Assistant Production Manager Ford testified that Montecon was terminated on May 7 because he failed to report for work 3 days in a row. The purported logic of this decision is that at one time Montecon was scheduled to complete his convalescence on May 3. Only if one ignores the fact that Montecon's convalescence was extended by Dr. Heinig on May 3, and that Montecon personally delivered Heinig's written report to that effect to Respondent's personnel office that very day, can one argue that Montecon was expected to report for work on May 4, 5, and 6, and therefore in a position to be discharged on May 7. Ford's testimony on this point, as on so many others, is absolutely incredible. If Montecon was termi-

nated on May 7, why was he not told this on May 24 when he met with Personnel Manager Tom Davis and gave Davis Heinig's release for Montecon to return to work full duty. Why was Montecon also later told by Supervisor Walker to return to work on May 30. It is apparent that Ford simply concocted a claim Montecon was terminated on May 7, because he thought that might fit one possible factual scenario, without having the slightest inkling that the actions of Respondent's own personnel manager and another supervisor would belie this concoction.

Respondent's assertion that it treated union supporters like all other employees pursuant to the new disciplinary system is completely undermined when actual circumstances of various discharges are scrutinized in detail. What becomes more and more clear, instead, is that Respondent not only instituted the new disciplinary system as a response to employee union activity, but that it then went to great extremes to ensnare those union activists in Respondent's web. I find that by all of these actions, Respondent violated Section 8(a)(1) and (3) of the Act. *Joe's Plastics*, supra.

Conclusions of Law

1. The Respondent, Performance Friction Corporation is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Automobile, Aerospace, Agricultural Implement Workers of America (UAW) is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent threatened employees that it would be futile for them to select the Union as their collective-bargaining representative; impliedly threatened to reduce wages if employees selected the Union to represent them;

interrogated employees about their union sympathies and activities, and the activities and sympathies of fellow employees; solicited grievances from employees and expressly or impliedly promised to remedy those grievances in order to discourage union activities among employees; and Respondent thereby violated Section 8(a)(1) of the Act.

4. Respondent instituted a new and stricter disciplinary system in response to employee union activity both to discourage such activity and to rid itself of union activists, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

5. Pursuant to its new and stricter disciplinary system, Respondent discharged union activists Martha Hinson, Merri Rowe, Haywood Steel, Susan Hudson, Manuel Montecon, Jerry Kennedy, and other employees, and Respondent thereby violated Section 8(a)(1) and (3) of the Act.

6. The unfair labor practices which Respondent has been found to have engaged in, as described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Counsel for the General Counsel argues that all discipline meted out and all discharges pursuant to Respondent's new disciplinary system are unlawful. Counsel for the General Counsel cites *Joe's Plastics*, supra. Respond-

ent argues otherwise, but cites no authority for its position. I agree with counsel for the General Counsel. The Board specifically stated in *Joe's Plastics*: "Having concluded that the Respondent's warning system was unlawful, it follows that the warnings . . . and the discharge . . . being premised on warnings received under the unlawful system, also violated Section 8(a)(3) and (1)."

As to discipline issued to and the discharges of Martha Hinson, Merri Rowe, Haywood Steel, Susan Hudson, Manuel Montecon, Jerry Kennedy, Michael Thompson, Kyle Myers, Bernard Young, and Leslie Teague, all specifically named in the complaint herein, Respondent has already had the opportunity and failed to show that it would have taken the same actions against these individuals even in the absence of union activity and even in the absence of Respondent's new and unlawfully imposed disciplinary system. As to discipline meted out to other individuals and other discharges pursuant to the new disciplinary system, however, Respondent shall be afforded at the compliance stage of this proceeding the opportunity to show that it would have taken these same actions even if Respondent had not instituted the new disciplinary system for unlawful reasons but had retained the old system. The burden of proof on such issues is clearly on Respondent. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Performance Friction Corporation, Clover, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that it would be futile for them to select the Union as their collective-bargaining representative; expressly or impliedly threatening to reduce wages if the employees select the Union to represent them; interrogating employees about their union sympathies and activities, and the activities and sympathies of fellow employees; soliciting grievances from employees; and expressly or impliedly promising to remedy those grievances in order to discourage union activities among employees.

(b) Instituting a new and stricter disciplinary system in response to employee union activity to discourage such activity and/or to rid itself of union activists.

(c) Issuing warnings to and/or discharging any employees for engaging in protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the new and stricter disciplinary system which was instituted by Respondents in response to employee union activity.

(b) Offer Martha Hinson, Merri Rowe, Haywood Steel, Susan Hudson, Manuel Montecon, Jerry Kennedy, and other employees unlawfully discharged pursuant to the new disciplinary system, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges; and make them whole, with backpay to be computed in the manner

prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus appropriate interest, for any loss of earnings they may have suffered as a result of the discrimination against them.

(c) Remove from its files any reference to the warnings and discharges found unlawful herein, and notify each of the individuals so warned and discharged, in writing, that this has been done and the evidence of the unlawful conduct will not be used as a basis for future personnel actions against any of those individuals.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Clover, South Carolina facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. April 6, 1995

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Apeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY THE ORDER OF THE
NATIONAL LAROR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid and protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees that it would be futile for them to select the Union as their collective-bargaining representative; expressly or impliedly threaten to reduce wages if employees select the Union to represent them; interrogate employees about their union sympathies and activities, and the activities and sympathies of fellow employees; solicit grievances from employees; and expressly or impliedly promise to remedy those grievances in order to discourage union activities among employees.

WE WILL NOT institute a new and stricter disciplinary system in response to employee union activity to discourage such activity and/or to discharge union activists.

WE WILL NOT issue warnings to and/or discharge any employees for engaging in protected concerted or union activities.

WE WILL NOT in any like or related manner interfere with, refrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the new and stricter disciplinary system which was instituted in response to employee union activity.

WE WILL offer Martha Hinson, Merri Rowe, Haywood Steel, Susan Hudson, Manuel Montecon, Jerry Kennedy, and other employees unlawfully discharged pursuant to the new disciplinary system, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and WE WILL make them whole, plus appropriate interest, for any loss of earnings they may have suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the warnings and discharges found unlawful, and notify each of the individuals so warned and discharged, in writing, that this has been done and the evidence of the unlawful conduct will not be used as a basis for future personnel actions against any of those individuals.

PERFORMANCE FRICTION CORPORATION

APPENDIX C

FILED November 17, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-3151
11-CA-16040

PERFORMANCE FRICTION CORPORATION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS, AFL-CIO, CLC,
Intervenor

No. 96-1096
11-CA-16040

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

PERFORMANCE FRICTION CORPORATION,
Respondent

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS, AFL-CIO, CLC,
Intervenor

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The Board and the Union filed a petition for rehearing and suggestion for rehearing in banc and both petitions and suggestions were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestions for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing and suggestions for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX D

[FILED August 8, 1997]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-3151

PERFORMANCE FRICTION CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS, AFL-CIO, CLC,
Intervenor.

No. 96-1096

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PERFORMANCE FRICTION CORPORATION,
Respondent,

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS, AFL-CIO, CLC,
Intervenor.

JUDGMENT

Before: WILKINSON, Chief Judge, LUTTIG, Circuit Judge, and BLACK, Senior United States District Judge for the District of Maryland, sitting by designation.

THIS CASE came on to be heard upon a petition filed by Performance Friction Corporation, to review an order of the National Labor Relations Board in Board Case No. 11-CA-16040, issued against said Petitioner, its officers, agents, successors, and assigns, on November 30, 1995, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on March 6, 1997, and has considered the briefs and transcript of record filed in this cause. On June 30, 1997, the Court, being fully advised in the premises, handed down its decision granting in part and reversing in part enforcement of the Board's Order, and remanding the case in part to the Board to fashion a more narrowly tailored remedial order. In conformity therewith, it is hereby ORDERED AND ADJUDGED by the Court as follows:

1. Petitioner, Performance Friction Corporation, Clover, South Carolina, its officers, agents, successors, and assigns, shall cease and desist from:

(a) Threatening employees that it would be futile for them to select the Union as their collective-bargaining representative; expressly or impliedly threatening to reduce wages if the employees select the Union to represent them; interrogating employees about their union sympathies and activities, and the activities and sympathies of fellow employees; soliciting grievances from employees and expressly or impliedly promising to remedy those grievances in order to discourage union activities among employees.

(b) Instituting a new and stricter disciplinary policy in response to employee union activity to discourage such activity or to rid itself of union activists.

(c) Issuing warnings, discharging, or taking other disciplinary action against any employees for engaging in protected concerted or union activities.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of

the rights guaranteed them by Section 7 of the National Labor Relations Act ("the Act").

2. Petitioner, Performance Friction Corporation, Clover, South Carolina, its officers, agents, successors, and assigns shall:

(a) Be permitted to retain in effect the disciplinary policy implemented on April 19, 1994, unless substantial evidence is developed that such policy is being enforced in a manner discriminatory toward the Union or the Company's pro-union employees.

(b) Provide to Manuel Montecon, Martha Hinson, Merri Rowe, Haywood Steele, Susan Hudson and Jerry Kennedy such relief, in any, that is appropriately determined in compliance proceedings, with back pay to be computed in the maner prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus appropriate interest, for the loss of earnings, if any, they may have suffered as a result of the discrimination against them, up until they declined to accept Performance Friction Corporation's offer of reinstatement. Performance Friction Corporation shall not be required to reinstate or provide back pay to Kyle Myers, Bernard Young, Leslie Teague, Michael Thompson, and Nedra Stewart, or any other employee except those mentioned above, until such time as it is proven that their discharges were the consequence of their pro-Union affiliation or sentiments.

(c) Remove from the files of Montecon, Hinson, Rowe, Steele, Hudson, and Kennedy any reference to the warnings, discipline, and discharges found unlawful, and notify each of the individuals so warned, disciplined, or discharged, in writing, that this has been done and that evidence of the unlawful conduct will not be used as a basis for future personnel actions against any of those individuals.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying during

compliance proceedings, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of back pay, if any, due under the terms of this Judgment.

(e) Post at its Clover, South Carolina facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 11 of the National Labor Relations Board (Winston-Salem, North Carolina), after being signed by the Petitioner's authorized representative, shall be posted by the Petitioner immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the said Regional Director, in writing, within 20 days from the date of this Judgment, what steps the Petitioner has taken to comply.

IT IS FURTHER ORDERED that the parties shall bear their own costs.

ENTERED at the direction of Judge Luttig with the concurrence of Chief Judge Wilkinson and Senior Judge Black, United States District Judge for the District of Maryland, sitting by designation.

/s/ Patricia S. Connor
Clerk

APPENDIX

NOTICE TO EMPLOYEES POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid and protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees that it would be futile for them to select the Union as their collective-bargaining representative; expressly or impliedly threaten to reduce wages if employees select the Union to represent them; interrogate employees about their union sympathies and activities and the activities and sympathies of fellow employees; solicit grievances from employees and expressly or impliedly promise to remedy those grievances in order to discourage union activities among employees.

WE WILL NOT institute a new and stricter disciplinary policy in response to employee union activity to discourage such activity or to discharge union activists.

WE WILL NOT issue warnings, discharge or take other disciplinary action against any employee for engaging in protected concerted or union activities.

WE WILL NOT in any like or related manner interfer with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide such relief, if any, that is appropriately determined in compliance proceedings, in the form of back pay and appropriate interest for any loss of earnings that Manuel Montecon, Martha Hinson, Merri Rowe, Haywood Steele, Susan Hudson, and Jerry Kennedy may have suffered as a result of the actions against them.

WE WILL remove from our files any reference to the warnings, discipline, and discharges proven to be unlawful, and notify each of the individuals so warned, disciplined, or discharged, in writing, that this has been done and that the warnings, discipline, or discharge will not be used against them in any way.

PERFORMANCE FRICTION CORPORATION

APPENDIX E

COMPLIANCE PROCEEDINGS

Sec. 102.52 *Compliance with Board order; notification of compliance determination.*—After entry of a Board order directing remedial action, or the entry of court judgment enforcing such order, the Regional Director shall seek compliance from all persons having obligations thereunder. The Regional Director shall make a compliance determination as appropriate and shall notify the parties of the compliance determination. A charging party adversely affected by a monetary, make-whole, reinstatement, or other compliance determination will be provided, on request, with a written statement of the basis for that determination.

Sec. 102.53 *Review by the General Counsel of compliance determination; appeal to the Board of the General Counsel's decision.*—(a) The charging party may appeal such determination to the General Counsel in Washington, D.C., within 14 days of the written statement of compliance determination provided as set forth in section 102.52. The appeal shall contain a complete statement setting forth the facts and reasons upon which it is based and shall identify with particularity the error claimed in the Regional Director's determination. The charging party shall serve a copy of the appeal on all other parties and on the Regional Director. The General Counsel may for good cause shown extend the time for filing an appeal.

(b) The General Counsel may affirm or modify the determination of the Regional Director, or may take such other action deemed appropriate, stating the grounds for the decision.

(c) Within 14 days after service of the General Counsel's decision, the charging party may file a request for review of that decision with the Board in Washington, D.C. The request for review shall contain a complete

statement of the facts and reasons upon which it is based and shall identify with particularity the error claimed in the General Counsel's decision. A copy of the request for review shall be served on the General Counsel and on the Regional Director.

(d) The Board may affirm or modify the decision of the General Counsel, or make such other disposition of the matter as it deems appropriate. The denial of the request for review will constitute an affirmance of the decision of the General Counsel.

Sec. 102.54 *Initiation of formal compliance proceedings; issuance of compliance specification and notice of hearing.*—(a) If it appears that controversy exists with respect to compliance with an order of the Board which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 21 days after the service of the specification.

(b) Whenever the Regional Director deems it necessary in order to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and notice of hearing issued pursuant to section 102.15 a compliance specification based on that complaint. After opening of the hearing, consolidation shall be subject to the approval of the Board or the administrative law judge, as appropriate. Issuance of a compliance specification shall not be a prerequisite or bar to Board initiation of proceedings in any administrative or judicial forum which the Board or the Regional Director determines to be appropriate for obtaining compliance with a Board order.

Sec. 102.55 *Contents of compliance specification.*

(a) *Contents of specification with respect to allegations concerning the amount of backpay due.*—With respect to allegations concerning the amount of backpay due, the specification shall specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

(b) *Contents of specification with respect to allegations other than the amount of backpay due.*—With respect to allegations other than the amount of backpay due, the specification shall contain a clear and concise description of the respects in which the respondent has failed to comply with a Board or court order, including the remedial acts claimed to be necessary for compliance by the respondent and, where known, the approximate dates, places, and names of the respondent's agents or other repsentatives described in the specification.

(c) *Amendments to specification.*—After the issuance of the notice of compliance hearing but prior to the opening of the hearing, the specification may be amended upon leave of the administrative law judge or the Board, as the case may be, upon good cause shown.

Supreme Court, U.S.
FILED
APR 17 1998
CLERK

No. 97-1340

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, CLC,
PETITIONER

v.

PERFORMANCE FRICTION CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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11 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that the National Labor Relations Board exceeded its remedial authority (a) in ordering the employer to rescind a new and stricter disciplinary system that discouraged employees from supporting the union's organizing campaign, which was determined to violate Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3); and (b) in ordering the employer to reinstate with backpay all employees discharged pursuant to it.

2. Whether the court of appeals erred in accepting the employer's representation that it had in fact offered reinstatement to six unlawfully discharged employees, thereby tolling the accrual of backpay, rather than permitting the Board to determine the facts in a compliance proceeding.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1340

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, CLC, PETITIONER

v.

PERFORMANCE FRICTION CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 117 F.3d 763. The decision and order of the National Labor Relations Board (Pet. App. 16a-23a), and the decision of the administrative law judge (Pet. App. 24a-69a), are reported at 319 N.L.R.B. 859.

JURISDICTION

The judgment of the court of appeals (Pet. App. 72a-77a) was entered on August 8, 1997. Petitions for rehearing were denied on November 17, 1997. Pet. App.

70a-71a. The petition for a writ of certiorari was filed on February 17, 1998 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Performance Friction Corporation (PFC) manufactures automotive brake pads at a plant in Clover, South Carolina. Pet. App. 2a, 26a. In February 1994, petitioner, United Automobile, Aerospace & Agricultural Implement Workers (Union), began an organizing campaign among the employees at the Clover plant. *Id.* at 3a, 26a. In response to the Union's organizing efforts, PFC implemented a new and stricter disciplinary system, which made it easier for PFC to discharge employees. *Id.* at 3a, 7a-8a, 58a-59a. PFC also discharged employees pursuant to the new disciplinary system. *Id.* at 4a, 8a, 18a.

2. Acting on charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint against PFC. Pet. App. 24a. After a hearing, the Board agreed with the administrative law judge by finding that PFC violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1) and (3), in three ways: by instituting the new disciplinary system "to discourage union activity and to rid itself of union activists" (Pet. App. 16a & n.1, 59a-60a; see also *id.* at 33a-40a); by discharging, pursuant to the unlawful new disciplinary system, employees Hinson, Rowe, Steele, Hudson, Kennedy, Meyers, Young, Teague, and other unnamed employees (*id.* at 18a; see also *id.* at 41a-50a, 60a-61a, 63a); and by discharging employee Montecon, albeit not pursuant to the unlawful new

disciplinary system. *Id.* at 17a n.2, 18a; see also *id.* at 50a-53a, 61a-63a.

As a remedy, the Board ordered PFC to "[r]escind the new and stricter disciplinary system"; to reinstate with backpay Hinson, Rowe, Steele, Hudson, Kennedy, Myers, Young, Teague, and "any other employees unlawfully discharged pursuant to the new disciplinary system"; and to reinstate Montecon with backpay. Pet. App. 19a-20a. The Board added that, in a subsequent compliance proceeding, PFC would be afforded "the opportunity to show that it would have taken the same action towards any of the additional unnamed discriminatees, even without the revised disciplinary policy." *Id.* at 18a n.3.

3. The court of appeals found substantial evidence to support the Board's findings that PFC "unlawfully implemented its new disciplinary system * * * to discriminate against the Union and union adherents" (Pet. App. 7a-8a); that PFC "used this new system to discourage union activity and thin its ranks of union activists by unlawfully discharging Hinson, Kennedy, Rowe, Steele, and Hudson" (*id.* at 9a); and that PFC fired Montecon "in retaliation for his pro-Union activities." *Id.* at 10a. The court thus enforced that portion of the Board's order requiring PFC to reinstate with backpay those six employees. *Id.* at 15a.

The court also concluded, however, that the Board "exceed[ed] its remedial authority when it ordered [PFC] to cease and desist from enforcing, and actually rescind, the new disciplinary system, and to reinstate with backpay *all* employees who had been discharged under that system, whether or not anti-union animus underlay their discharges." Pet. App. 10a. The court stated that "it does not follow from the

fact that a company adopts a particular policy out of impermissible motives, that its application of that policy in all instances will have the impermissible discriminatory effects reached by the Act." *Id.* at 11a. The court added that the new disciplinary system was "facially neutral" (*ibid.*), and that "[t]here is absolutely no evidence that any individual other than the five known Union activists discharged under the new disciplinary system, was so discharged because of his union affiliation or sympathies." *Id.* at 12a.

Accordingly, the court directed the Board on remand to modify its remedial order "so as to permit the company to retain in effect its disciplinary policy * * * unless substantial evidence develops that that policy is being enforced in a manner discriminatory toward the Union or the company's pro-union employees." Pet. App. 15a. The court further directed the Board "not [to] require the company to reinstate with backpay * * * any * * * employee except [Hinson, Kennedy, Rowe, Steele, Hudson, and Montecon] until such time as it is proven that their discharges were the consequence of their pro-Union affiliation or sentiments." *Ibid.*

DISCUSSION

1. Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to "discriminat[e]" with regard to hiring, tenure, or terms or conditions of employment in order to "discourage membership in any labor organization." 29 U.S.C. 158(a)(3). In this case, the court of appeals concluded that substantial evidence supported the Board's finding that PFC "unlawfully implemented its new disciplinary system * * * to discriminate against the Union and union adherents." Pet. App. 7a-8a. In such circumstances,

the Board typically orders the employer to rescind the new, unlawful disciplinary policy, as well as the discipline that may have been meted out thereunder.[1] The Board similarly issued appropriate orders to restore the status quo in this case. See Pet. App. 19a-20a. Accordingly, we agree with petitioner (Pet. 10, 14-19) that, having upheld the Board's unfair labor practice finding, the court of appeals erred in refusing to uphold the Board's order requiring rescission of PFC's unlawful disciplinary policy and in limiting the Board's reinstatement and backpay award to only those employees discharged by PFC under that disciplinary policy who were shown to be pro-Union.

The Board did not file its own petition for a writ of certiorari, however, because the Fourth Circuit has articulated the correct remedial principles, both before and after its disposition of this case. In *NLRB* v. *Frigid Storage, Inc.*, 934 F.2d 506, 510 (1991), for example, the Fourth Circuit recognized that "[a] new system for discipline violates the Act if implemented in retaliation for union activity" and that "[l]ayoffs intended to 'discourage membership in any labor organization' violate the [Act], even if the employer

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[1] See, *e.g.*, *Hyatt Hotels Corp., d/b/a Hyatt Regency Memphis*, 296 N.L.R.B. 259, 259-263, 265-266 (1989), enforced in relevant part, 939 F.2d 361 (6th Cir. 1991); *Electri-Flex Co.*, 228 N.L.R.B. 847, 847-848, 849-850 (1977), enforced in relevant part, 570 F.2d 1327 (7th Cir.), cert. denied, 439 U.S. 911 (1978). See also *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (Board may fashion remedies "fall[ing] within the general purpose of making the employees whole, and thus restoring the economic status quo that would have obtained but for the company's wrongful [conduct]"); *ABF Freight System, Inc.* v. *NLRB*, 510 U.S. 317, 324 (1994) (Board's remedial views "merit the greatest deference").

wields an undiscerning axe, and anti-union employees suffer along with their pro-union counterparts." (citation omitted). The court thus enforced a Board order that required the employer, among other things, to cease and desist from continuing to use an unlawfully implemented written warning system, and to rescind the written warnings issued pursuant to it. *Ibid.*; see *Frigid Storage, Inc., d/b/a Economy Foods*, 294 N.L.R.B. 660, 662-663 (1989). Similarly, in *Alpo Petfoods, Inc.* v. *NLRB*, 126 F.3d 246 (1997), the Fourth Circuit observed that "[e]ven when the axe is wielded in accordance with seniority rules, courts enforce the Board's order as to all discharged employees, not just those whom the employer was explicitly targeting." *Id.* at 256.[2] The court's failure to apply that rule in this case thus appears to be based entirely on its interpretation of the facts, and not a reassessment of the applicable legal standard.

2. Petitioner also contends (Pet. 12-13, 22-28) that, in framing the judgment in this case, the court of appeals erred in specifying that PFC's backpay obligation toward unlawfully discharged employees Hinson, Kennedy, Rowe, Steele, Hudson, and Montecon

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[2] Petitioner asserts (Pet. 28) that the present case cannot be regarded as an "aberration" because, in the subsequent case of *Eldeco, Inc.* v. *NLRB*, 132 F.3d 1007 (1997), "another panel of the Fourth Circuit repeated the same mistake." However, in *Eldeco*, unlike the present case, the court concluded that the evidence did not support the Board's finding that the employer's new drug testing policy violated Section 8(a)(1) of the Act; accordingly, the court "den[ied] any recovery related to the drug testing policy." 132 F.3d at 1012. The *Eldeco* court did not refer to the instant case in so holding, nor did it address the scope of the Board's remedial authority in cases where the employer's new policy is found to be unlawfully motivated.

continued to accrue only "up until they declined to accept [PFC's] offer of reinstatement." See Pet. App. 74a. According to petitioner (Pet. 24-25), the court's ruling was based on a representation, made by PFC's counsel, that PFC had in fact offered reinstatement to the six employees, whereas the court should have allowed the Board to address that factual question in a compliance proceeding.

However, the court's tolling of the employees' back-pay award is consistent with the law that would apply in a compliance proceeding if, in fact, the employees received valid offers of reinstatement from PFC. See, *e.g.*, *Hoffman Plastic Compounds, Inc.*, 314 N.L.R.B. 683, 683 (1994). While the court should have permitted the Board to determine the facts in the first instance, the court's failure to do so does not present an issue of sufficient importance independently to warrant this Court's review.

CONCLUSION

For the foregoing reasons, although the court of appeals should have enforced the Board's order without modification, the Board did not file its own petition for a writ of certiorari. However, should the Union's petition be granted, the Board will defend its decision and order.

Respectfully submitted.

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No. 97-1340

In The
Supreme Court of the United States

October Term 1997

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, CLC,

Petitioner,

v.

PERFORMANCE FRICTION CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an appellate court may modify a remedy imposed by the National Labor Relations Board when:

   a. the court determines that the Board exceeded its remedial authority by requiring that an employer completely rescind a facially neutral disciplinary system and reinstate with back pay hundreds of workers discharged over a several year period pursuant to that disciplinary system; and

   b. there is no evidence of union interest, activity or affiliation of such workers.

2. Whether an appellate court may comment in its opinion on facts regarding the total number of employees affected by a disciplinary policy and direct that the National Labor Relations Board, in proceedings following remand, apply well settled law limiting the back pay award for the six employees that the Board found to be discharged in violation of the National Labor Relations Act to the period prior to the time those employees declined to accept an offer of reinstatement.

PARTIES TO THE PROCEEDINGS BELOW AND DISCLOSURE UNDER SUP. CT. R. 29.6

The petition accurately lists the parties to the proceedings below. The Respondent, Performance Friction Corporation, has no parent companies or non-wholly owned subsidiaries.

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STATEMENT OF THE CASE

1. Background

Performance Friction Corporation ("PFC") manufactures high-performance, non-asbestos automotive disc brake pads for a variety of vehicles, for all types of automobile racing, for fleet vehicles, for school buses and for sale in the replacement parts market. App. 2a. Since 1986, when it had 25 employees, it has grown steadily. Id. Its customers have strict quality standards and delivery schedules that PFC must meet weekly. J.A. 329-31. To produce products of exceptional quality, PFC emphasizes training, particularly for its comprehensively computerized operations, and individual responsibility. Any employee has the authority and responsibility to shut down the production process if it is producing parts that fail to meet specification or are of questionable quality. J.A. 739-40. In fact, PFC has been nationally recognized in the industry for empowering its employees and actively involving them in its state of the art computerized production process. J.A. 1217-1221.

Between 1990 and 1994, PFC grew from 100 to 400 employees (a 300 percent increase). See App. 2a. Throughout this same period, although PFC maintained a core group of very loyal and committed employees, a significant percentage of its workers had difficulty meeting or were unwilling to meet PFC's stringent quality standards, work routines and intellectual involvement. PFC thus experienced a large turnover in its workforce annually. Id. During this period of rapid change, PFC also found it necessary to make various changes in its day-to-day policies and procedures.

Beginning in late summer 1993 (well before any union activity at the company), PFC began considering changes to both its pay policies and its disciplinary policies. See App. 3a. Prior to November 1993, PFC's disciplinary policy provided that three minor violations within a thirty-day period equaled a major violation. See App. 4a. An employee who committed two major violations in thirty days received a three-day suspension, and the third major violation in thirty days resulted in termination of employment. App. 4a. PFC found that this policy did not provide effective deterrence to employee misconduct, neglect or sloppiness.

At the same time, PFC was looking for a way to reward conscientious employees and encourage improved performance. Thus, beginning in November 1993, PFC changed both the way it compensated its hourly employees and its disciplinary system. A central component of PFC's new compensation plan was a system of seven pre-defined pay levels. App. 3a. Employees could advance pay levels by taking and passing certain job-related tests at their own pace. J.A. 333-34, 491-92. The new compensation system allowed employees to increase their earnings more rapidly than under the old system, even if they had been disciplined.

PFC also changed its existing disciplinary system. Employees who committed too many violations would not be "rewarded" with time off from work, but would instead have the consequence of a reduced level of pay. See App. 4a. Under the new disciplinary system, any employee who committed two major violations within a ninety-day period or three major violations in six months was demoted a pay level. For employees already at pay level one, the result was termination. App. 4a.

The combination of the pay level system, which allowed increased earnings opportunities, and the revised disciplinary system, which tied the consequences of misconduct or poor performance directly to compensation, provided PFC's employees with an incentive system for

improving production quality and efficiency. For example, employees could be rewarded for reducing the amount of wasted materials and labor from the production of scrap. J.A. 346-347, 351. These policy changes did in fact have this desired result. The undisputed record evidence reveals that PFC's scrap rate dropped from almost 11 percent in late 1993 to 2.7 percent in the months following the implementation of the revised pay and disciplinary policies. App. 3a.

Between February and May of 1994, the United Automobile, Aerospace, Agricultural Implement Workers of America ("Union") engaged in efforts to unionize PFC's workforce. App. 3a. PFC opposed the union efforts. App. 3a.

2. Administrative proceedings below

The hearing before the Administrative Law Judge ("ALJ") was based on a complaint that eleven named employees of PFC had been discharged because of their union activities pursuant to the new disciplinary policy. App. 4a-5a. The original unfair labor practice charge identified two discharged union activists. The first amended charge and the complaint increased the list to six, and the second amended complaint named five additional discharged activists. App. 5a. Despite these various amendments, the complaint did not refer to, nor did it purport to seek relief on behalf of, other similarly situated unnamed employees discharged pursuant to the new disciplinary policy.

At the ALJ hearing in December of 1994, the Board and the Union presented evidence as to only six of the eleven named claimants, each of whom was discharged between April 19 and May 30, 1994. App. 5a. Between April 19, 1994 and the time the case was heard by the ALJ in December 1994, PFC had discharged a total of approximately 180 employees. App. 5a. PFC presented this

evidence at trial in an effort to demonstrate the neutral application of its disciplinary policy.

At the close of the Board's case-in-chief, the Board, the Union, PFC and the ALJ each viewed this case in the same manner -- the government and the Union were seeking relief for eleven named individuals allegedly discharged in violation of Section 8(a)(3) of the National Labor Relations Act ("Act"). Evidence was before the ALJ as to only six individuals. At no time prior to that point had the Board so much as hinted that it was interested in seeking relief on behalf of anyone other than the eleven individuals named in the complaint. Consequently, at the close of the Board's case, PFC moved to dismiss the complaint as to those five individuals about whom no evidence was presented. App. 5a. At that time, the ALJ sua sponte advised the Board and the Union to move to further amend the complaint to add unknown and unnamed persons discharged under PFC's new disciplinary policy, and then granted the motion to add such unknown persons. Id.[1]

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[1] Although petitioner now suggests that a sweeping remedy is entirely consistent with Board law, it is apparent from the hearing transcript that had it not been for the ALJ's prodding, neither the Board nor the Union intended to expand the focus of its case beyond the eleven named individuals. J.A. 307-309, 314-324. The fact that all parties were operating on the notion that the trial was limited in scope solely to the individuals specifically named in the complaint is underscored by the exchange between the ALJ and counsel, after the ALJ suggested the idea of the amendment in response to PFC's motion to dismiss. The Union's attorney stated, "Your Honor, can I ask perhaps a question that shows my ignorance. . . . How, in fact, do we go about -- Do we -- Should we amend the complaint to include 'and all other unknown and unnamed people who may have suffered from this.' Is that the way we accomplish that?" The ALJ responded, "That would certainly be the best way to do it and I would suggest you discuss that with Counsel for General Counsel because they have it within their discretion whether or not to pursue that." J.A. 314-315.

The ALJ's decision to expand the case after the close of the Board's evidence transformed the case from a purposefully limited action to an action seeking sweeping relief for an indefinite and constantly growing class of alleged victims. In keeping with the ALJ's opinion, the Board subsequently ordered PFC not only to reinstate those six named individual as to whom the General Counsel had presented proof of unlawful discrimination, but also to reinstate with back pay all individuals who were discharged under PFC's new disciplinary policy, regardless of their union affiliation. App. 7a.[2] As a result, PFC was faced with presumptive liability for hundreds of thousands of dollars of back pay and reinstatement to hundreds of employees about whom there was not a shred of evidence of any union interest, activity or affiliation. App. 12a.

3. The Fourth Circuit's decision

The Fourth Circuit, in a unanimous opinion authored by Judge Luttig, affirmed the Board's findings of certain violations of the National Labor Relations Act (which are not at issue here), but determined that the Board's remedial order exceeded its authority insofar as it required: (a) that PFC reinstate with back pay all of the employees discharged by PFC regardless of the reasons for their discharge; and (b) that PFC rescind the new disciplinary policy. App. 10a. The appeals court explained that in order to remedy discrimination, the Board's remedial order must be "congruent with the scope of discrimination." App. 11a. The court warned against "the Board's substitution of its own 'business judgment' for the employer's legitimate business judgment." App. 11a. The court emphasized the complete lack of evidence that any individuals other than six known

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[2] As of September 9, 1996, the number of discharged workers was more than 300 employees. The number at present is closer to 400 employees -- a number greater than PFC's regular workforce.

union activists were improperly discharged or affiliated in any way with the Union. App. 12a. It also emphasized the lack of rationality in requiring PFC to rescind a facially neutral discipline policy that the Board itself conceded could be reinstituted the day following its rescission. Id.

Accordingly, the Fourth Circuit required the Board to modify its remedial order: (a) to permit PFC to retain its new disciplinary system unless substantial evidence develops that it was being enforced in a manner discriminatory toward the Union or pro-union employees; and (b) to negate the requirement that PFC reinstate with back pay any employee, (except those six employees about whom evidence was presented and specific findings were made concerning PFC's motivation for their discharges), until such time as it is proven that their discharges were the consequence of their pro-union affiliation or sentiments. App. 15a.

Both the Board and the Union filed petitions for rehearing and suggestions for rehearing en banc, which were denied by the Fourth Circuit. App. 70a-71a.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit Properly Determined, On The Facts Of This Case, That The Board Exceeded Its Remedial Authority.

In requiring that the Board's remedy be tailored to address the specific violations found, the Fourth Circuit acted consistently with case law, including the decisions of this Court, and with the requirements of the National Labor Relations Act. The Fourth Circuit's decision prevented the Board's back pay remedy from extending beyond the few employees held to have been discharged for their union activities to encompass employees who were discharged for entirely legitimate reasons. The decision also assured that PFC would be permitted to use its own business judgment as to the most effective promotion and discipline policy, in the

absence of any evidence of discriminatory enforcement. App. 15a. Thus, the appeals court assured that Board's remedy would correct actual violations and not improperly interfere with legitimate business decisions.

It is a cardinal principle of labor law that "a proposed remedy be tailored to the unfair labor practice it is intended to redress." Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 900 (1984). In Sure-Tan, the Court noted that the Board's authority was limited under 29 U.S.C. ' 10(c) to orders that "effectuate the policies of the Act." Sure-Tan, 467 U.S. at 900. Thus, this Court explained that "a back pay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." Id. at 900 (citation omitted) (emphasis in original). Based on this rule, the Court rejected a back pay award unsupported by "record evidence as to the circumstances of the individual employees." Id. at 901.

This requirement of a tailored remedy is necessary to prevent improper intrusions into business operations. Thus, for example, the D.C. Circuit required modification of an order of the Board as "overbroad, since it catches within its sweep not only prohibited conduct such as that which formed the basis for the finding of unfair labor practices here, but a number of otherwise valid management practices." McGraw-Edison Co. v. NLRB, 533 F.2d 1266, 1268 (D.C. Cir. 1976); see also Gold Coast Restaurant Corp. v. NLRB, 995 F.2d 257 (D.C. Cir. 1993) (requiring modification of Board's overbroad order where such order prevented employer from utilizing its disciplinary system for legitimate business purposes). The Fifth Circuit has likewise determined that a sweeping back pay and reinstatement remedy by the Board for an employer's unlawfully motivated consolidation of its business that resulted in the discharge of numerous employees was not sufficiently tailored to the union animus found. See Electronic Data Systems Corp. v. NLRB, 985 F.2d 801, 807 (5th Cir. 1993).

Similarly, the Sixth Circuit has held that "an order is overly broad" that compelled an employer "to reinstate individuals absent a showing of wrongful discharge." Marlene Indus. Corp. v. NLRB, 712 F.2d 1011, 1020 (6th Cir. 1983). Moreover, as the Marlene court explained, the remedial powers of the Board in making back pay awards are expressly limited by the terms of the National Labor Relations Act. The Act states, "No order of the Board shall require reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 U.S.C. §160(c); see also Ultrasystems Western Constructors, Inc. v. NLRB, 18 F.3d 251, 259 (4th Cir. 1994) (applying 29 U.S.C. § 160(c) and requiring modification of remedy to assure it is "congruent with the scope of discrimination, so that its enforcement neutralizes the discrimination, and does not go beyond").

The portion of the Fourth Circuit's decision challenged by petitioner does no more than apply the well-settled requirement of a tailored remedy set forth in Sure-Tan, McGraw-Edison, Marlene Industries and elsewhere, and implicit in the Act itself. As the court explained, the Board's broad order "essentially presumes discrimination by the company in its discharges under a facially neutral business plan." App. 11a (emphasis in original). There was "absolutely no evidence" regarding the discharges of the overwhelming number of persons affected by the Board's order. App. 12a.

As to all but the six discharged employees about whom evidence was presented at trial, the Board's decision below was plainly overbroad. The Board's lack of tailoring was similarly clear in the requirement that PFC's new disciplinary policy be rescinded. As the Fourth Circuit recognized, this policy was facially neutral, and no evidence indicated discriminatory application to anyone besides five

union activists[3] during a one-month period. App. 12a. Requiring that this policy be entirely abandoned and replaced with some other policy, perhaps similar, but less satisfactory to PFC, would serve no purpose. Indeed, as Judge Luttig's opinion notes, at oral argument counsel for the Board conceded that PFC "could rescind its 'unlawful' disciplinary policy on one day and lawfully reimplement the exact same plan the next day, provided that the company satisfies the Board that it has been purged of its malevolence toward the union." App. 12a. If something as simple as a rescission of the policy on one day and reimplementation of the exact same policy on the following day can "cure" its illegality, there is no justification whatsoever for a sweeping remedial order that grossly exceeds any legitimate objectives and unfairly impinges upon otherwise valid management practices over a multi-year period that are causally and temporally unrelated to any union activity.

It should be noted that the appeals court did not rule out the possibility of reinstatement and backpay for the numerous discharged employees about whom no evidence was presented, but merely required that such a remedy be justified by proof. App. 15a. Similarly, the court required that there be proof of discriminatory enforcement of the new disciplinary policy as a condition for any requirement that it be rescinded. Id. The court's order merely directed that the remedy in this case be tailored "so as not to prohibit lawful employer activity." App. 13a (emphasis in original). It did nothing more. Thus, no further review by this Court is needed.

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[3] The sixth employee found to have been discriminatorily discharged was not discharged under the new disciplinary system.

II. The Fourth Circuit's Decision Is Not In Conflict With Other Appellate Decisions.

Petitioner's primary ground for seeking certiorari review in this case is its contention that there is a direct conflict between the decision below and other appellate decisions. As explained in Part I, however, the Fourth Circuit in this case quite properly applied to particular facts the well-established requirement that the Board's remedies be tailored to proven violations. Each of the cases on which petitioner relies is readily distinguishable from the decision below.

Petitioner cites four cases for the proposition that where an employer's policy is "adopted illegally . . . [it] must be rescinded, and . . . each employee injured by the use of the illegal policy, must be made whole." Pet. 15. None of these four cases stand for this proposition. First, NLRB v. Frigid Storage, Inc., 934 F.2d 506, 510 (4th Cir. 1991), does not even mention the Board's remedy or its appropriateness. Rather, the only relevant issue before the court was whether the employer's written warning system for work infractions was implemented in retaliation for union activity. Petitioner's representation to this Court, (Pet. 16), that the case involved a challenge to the Board's remedy is without foundation. There is no conflict between Frigid Storage and the case at bar. Frigid Storage did not even discuss the Board's remedial authority.

The Seventh Circuit's decision in Electri-Flex Co. v. NLRB, 570 F.2d 1327 (7th Cir.), cert. denied, 439 U.S. 911 (1978), is distinguishable from the instant case for the same reason as the Frigid Storage decision -- the court was not asked to address nor did it address the scope of remedy ordered. Rather, the court in Electri-Flex merely concluded that the employer's implementation of a written warning system to retaliate against union supporters violated Section 8(a)(3) of the Act. Electri-Flex, 570 F.2d at 1334-35.

Petitioner further points to the Fourth Circuit's decision in Fieldcrest Cannon, Inc. v. NLRB, 97 F.3d 65 (4th Cir. 1996), as a case requiring an employer to "rescind unlawful company rules." Pet. 15. Unlike the employers in Frigid Storage and Electri-Flex, the employer in Fieldcrest Cannon did challenge to the scope of the Board's remedy. In upholding the Board's remedial measures, however, the Fourth Circuit expressly limited its holding to the "extraordinary circumstances" of the case, which the Board had characterized as "pervasive" and "outrageous." 97 F.3d at 72. Because of these unusual circumstances, the court found the remedy "did not amount to an abuse of the Board's remedial power." Id. at 74. The Fieldcrest Cannon court carefully noted, "We do not suggest that these steps would be appropriate in every case." Id.

In short, only the unique facts of Fieldcrest Cannon justified the broad remedy there, and the very different facts of this case are sufficient to distinguish it.[4] The same is true of Hyatt Corp. v. NLRB, 939 F.2d 361, 375 (6th Cir. 1991), where the court found "direct evidence, in addition to statistical evidence, that the termination of all twelve employees was substantially motivated by anti-union animus." Here, in contrast, there was no evidence of improper motive for the discharge of any but six of the hundreds of employees covered by the Board's order.

In addition to alleging nonexistent conflicts with the circuit court authority just discussed, petitioner contends that the Fourth Circuit's decision conflicts with this Court's decision in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964), and the D.C. Circuit's decision in Power, Inc. v. NLRB, 40 F.3d 409 (D.C. Cir. 1994). Pet. 17. Fibreboard and Power, Inc. are readily distinguishable. Both of those cases addressed the Board's remedial authority in the

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[4] Interestingly, the Fieldcrest Cannon opinion was authored by Chief Judge Wilkinson, a member of the unanimous panel in this case.

special context of an employer who unlawfully refused to bargain with the union over the mandatory subject of subcontracting in violation of Section 8(a)(5) of the Act. The employers in both cases had discontinued a segment of their operations after subcontracting the work to a third party. The appropriateness of a widespread back pay and reinstatement order in those cases was expressly predicated on the need "to insure meaningful bargaining." See Power, Inc., 40 F.3d at 425 (quoting Fibreboard, 379 U.S. at 216). Because PFC was never under any bargaining obligation with the Union, the rationale asserted for the sweeping remedy in Fibreboard and Power, Inc. is wholly inapplicable.

In short, none of the numerous authorities cited by petitioner conflicts with the Fourth Circuit's decision on the facts of this case. Petitioner has taken extreme liberties in interpreting case law from various circuits in an attempt to create the appearance of a conflict and attract this Court's attention. There is, in the end, no conflict that requires resolution by this Court, and this basis for review does not apply here.

III. The Issues Presented In This Case Are Highly Fact-Specific and Are Not Sufficiently Important To Warrant This Court's Review.

Even a cursory reading of the decision below shows that it is addressed to unusual and complicated facts. The Fourth Circuit does not purport to be establishing a new principle of law, but rather merely applies settled law to specific facts. There is no foundation for an argument that this case is a matter of significant public interest and should for that reason be reviewed by this Court.

Nevertheless, petitioner attempts to argue that this case is important because it is serving as precedent for further error. Pet. 28-29. Citing the Fourth Circuit's recent decision in Eldeco, Inc. v. NLRB, 132 F.3d 1007 (4th Cir. 1997), petitioner states that as in this case, the Fourth Circuit

in Eldeco declined to punish a company and allow remedial relief for its illegally implemented but facially neutral drug testing program, where there was no evidence that it was disparately enforced against union sympathizers. Pet. 28. Although the holding and rationale in Eldeco are consistent with the holding and rationale in Performance Friction, Eldeco is also consistent with many other prior decisions. Moreover, Eldeco, which was decided by an entirely different panel of the Fourth Circuit, does not even mention Performance Friction in reaching its conclusion. In fact, contrary to petitioner's purely speculative suggestion that the instant case has already served as a dangerous precedent, PFC's research did not uncover a single case in any federal court since the June 30, 1997 decision in this matter that makes any mention of Performance Friction.

Petitioner also attempts to argue that this case is of importance based on petitioner's speculation as to the employees' feelings about the new disciplinary system. Pet. 18-19. According to petitioner, the system is "a daily reminder to all PFC employees of the consequences of attempting to exercise their rights under the NLRA" that results in "terrified" employees. Pet. 9, 18. This is, of course, pure conjecture; it has no basis in the record. Moreover, it is completely unreasonable conjecture. Most of the approximately 400 employees terminated by PFC since 1994 who were covered by the Board's sweeping remedial order were hired after the new disciplinary system was put into effect, were not even aware of the prior system or any union activity, were discharged for reasons clearly permissible under both the new and the old systems (e.g., substance abuse, sexual harassment, insubordination), or simply quit by choosing not to return to work. Moreover, because they were hired under the new disciplinary system, those employees knew from the date they accepted employment the legitimate, nondiscriminatory rules by which their performance and conduct would be evaluated.

Similarly, petitioner's additional suggestion that the 400 or so employees terminated by PFC since 1994 under its new disciplinary policy were discharged "in order to cover [PFC's] tracks", (Pet. 18-19, n.3), is both completely speculative and implausible. It simply defies logic that PFC would "get rid of" 400 employees over a period of several years solely to "cover its tracks" as to five or six union activists discharged in a one-month period during the Spring of 1994. Such a strategy makes no business sense and would be inconsistent with PFC's need, as demonstrated in the record, to have a well-trained workforce committed to quality. The sheer number of terminations at PFC and the comparatively nominal number of union adherents (six) highlights the lack of any credible foundation for petitioner's speculation.

In sum, there is no basis for concluding that this case involves issues of sufficient public importance to merit the attention of this Court. For this reason, the petition should be denied.

IV. The Fourth Circuit Had Jurisdiction To Modify The Board's Overbroad Remedial Order.

Petitioner claims that the Fourth Circuit improperly engaged in its own "fact-finding" to justify its decision to limit the Board's overbroad remedy and thereby exceeded its appellate jurisdiction. Pet. 22-23. Even if the decision below involved such error, it would not be a sufficient justification for review by this Court. In fact, however, there was no such error. The Fourth Circuit's decision was an entirely customary and proper exercise of appellate jurisdiction.

Petitioner's "jurisdiction" argument is nothing more than a restatement, under a new label, of its earlier argument that the Fourth Circuit inappropriately infringed upon the Board's remedial authority. In its attempt to recharacterize this earlier argument as a jurisdictional issue, Petitioner apparently objects to two statements in the opinion below -- neither of which had any impact on the decision of the court. First, petitioner refers to a statement in the court's judgment (not its opinion) that eligible employees should receive back pay with interest "up until they declined to accept Performance Friction Corporation's offer of reinstatement." App. 74a. Petitioner argues that the Fourth Circuit lacked jurisdiction to address this point because PFC first raised the question of its reinstatement offers to those six individuals (none of whom accepted the offers) in its Objections to Proposed Judgment dated July 18, 1997, and there was no opportunity for the Board or the Union to respond on that issue. Pet. 24-25. Petitioner contends that this matter must be left to the Board's compliance proceedings.

It is, however, black letter law that an employer's back pay obligation terminates upon an unconditional offer of reinstatement. See, e.g., Canova v. NLRB, 708 F.2d 1498, 1505 (9th Cir. 1983); Oil, Chem. & Atomic Workers Int=l Union v. NLRB, 547 F.2d 598, 601 n.3 (D.C. Cir. 1976); cf. Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) (reaching same conclusion under Title VII of the Civil Rights Act of 1964 in reliance on analogous remedial provisions and case law under NLRA). In late September and early October of 1996, with the knowledge of counsel for both the Board and the Union, PFC made unconditional reinstatement offers. At the request of the Union's counsel's and the suggestion of the Board Compliance Supervisor, PFC provided copies of those offers to counsel for the Board and the Union. Because the reinstatement offers were made in October of 1996, after PFC had already filed its Brief with this Court, there was no forum within which PFC could have raised the issue until the judgment phase.

In any event, contrary to petitioner's assertion, the Fourth Circuit did not "engage in fact-finding" or "foreclose full make-whole remedies to [the] illegally fired discriminatees" when it ordered that back pay be cut off as of the date that the discriminatees refused PFC's reinstatement offers. Pet. 8. The Fourth Circuit merely acknowledged, consistent with long-standing precedent, the well-settled principle that any back pay remedy must cease after a reinstatement offer is declined. Even if the Fourth Circuit's judgment could fairly be characterized as "fact-finding" on the issue of whether reinstatement offers were made, the judgment does not foreclose the Board's ability to present evidence during compliance proceedings challenging the legitimacy of those reinstatement offers.

Petitioner makes reference to one other supposedly improper statement of the Fourth Circuit -- the total number of persons who have been subject to the new disciplinary system. Pet. 27. The Fourth Circuit, citing the joint appendix and briefing, said, "[A]ccording to its counsel, the company has now terminated over 300 employees total." App. 4a. It is difficult to see anything improper in this observation.[5] It is even more difficult to imagine how, even if there was impropriety in this statement, it could possibly justify review by this Court.

In the end, there is no basis at all for petitioner's allegations that the Fourth Circuit exceeded its jurisdiction and engaged in improper fact finding. Just as with its arguments on nonexistent conflicts and issues involving unique facts, this supposed basis for review should be rejected.

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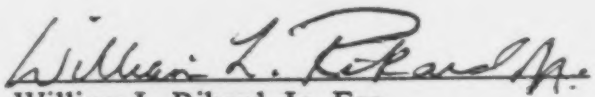
[5] The Fourth Circuit's underlying point -- that numerous employees were discharged pursuant to the new disciplinary policy -- is well-supported by the record. App. 4a.

CONCLUSION

For the reasons stated above, PFC respectfully asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,



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